DOCKET

SUPREME COURT
OF THE UNITED STATES

No.	10-235
Title	CSX Transportation, Inc., Petitioner v. Robert McBride
Docketed	August 18, 2010
Lower Ct.	United States Court of Appeals for the Seventh Circuit
Case Nos.	(08-3557)
Decision Date	March 16, 2010
Rehearing Denied	June 3, 2010
Questions Presented	

---Date---	--------Proceedings and Orders----------
Aug 18 2010	Petition for a writ of certiorari filed. (Response due September 17, 2010)
Sep 10 2010	Order extending time to file response to petition to and including October 18, 2010.
Sep 17 2010	Motion for leave to file amicus brief filed by the Association of American Railroads.
Oct 18 2010	Brief of respondent Robert McBride in opposition filed.
Nov 1 2010	DISTRIBUTED for Conference of November 23, 2010.
Nov 1 2010	Reply of petitioner CSX Transportation, Inc. filed. (Distributed)
Nov 29 2010	Motion for leave to file amicus brief filed by the Association of American Railroads GRANTED.
Nov 29 2010	Petition GRANTED.
Dec 23 2010	SET FOR ARGUMENT ON Monday, March 28, 2011.
Jan 13 2011	Joint appendix filed. Statement of costs filed.
Jan 13 2011	Brief of petitioner CSX Transportation, Inc. filed.
Jan 20 2011	Brief amicus curiae of The Association of American Railroads filed. (Distributed)
Jan 25 2011	CIRCULATED.
Jan 27 2011	Record from U.S.C.A. for 7th Circuit is electronic.
Feb 1 2011	Record from U.S.D.C. for Southern District of Illinois is electronic.
Feb 10 2011	The time to file respondent's brief on the merits is extended to and including February 22, 2011.
Feb 22 2011	Brief of respondent Robert McBride filed. (Distributed)
Feb 25 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.

Feb 25 2011 Brief amici curiae of American Train Dispatchers Association, et al. filed. (Distributed)

Mar 1 2011 Brief amicus curiae of Academy of Rail Labor Attorneys filed. (Distributed)

Mar 1 2011 Brief amicus curiae of American Association for Justice filed. (Distributed)

Mar 1 2011 Brief amici curiae of Cheryl Campagno, Daniel D. Hill, and Frances K. Jennings filed. (Distributed)

Mar 17 2011 Reply of petitioner CSX Transportation, Inc. filed. (Distributed)

Mar 28 2011 Argued. For petitioner: Charles A. Rothfeld, Washington, D. C. For respondent: David C. Frederick, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

ROBERT McBRIDE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Petitioner CSX Transportation, Inc. has a parent company, CSX Corporation, which is publicly traded. No other publicly held company owns more than 10 percent of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, CSX Transportation, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-40a) is reported at 598 F.3d 388. The memorandum and order of the district court denying petitioner's motion for reversal, a new trial, or remittitur (App., *infra*, 41a-43a) is unreported but is available at 2008 WL 4185933.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2010. A timely petition for rehearing en banc was denied on June 3, 2010. App., *infra*, 47a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, are reproduced in the Appendix. App., *infra*, 48a-52a.

STATEMENT

The Federal Employers' Liability Act (FELA or Act) authorizes a railroad employee to recover for a workplace injury "resulting in whole or in part from the negligence" of the railroad, 45 U.S.C. § 51, with damages reduced in proportion to any contributory negligence by the employee. In *Norfolk Southern Railway* v. *Sorrell*, 549 U.S. 158 (2007), this Court addressed whether a defendant's negligence and a

plaintiff's contributory negligence are governed by the same causation standard under the Act. The Court applied the established principle that "the elements of a FELA claim are determined by reference to the common law" unless the Act contains "express language to the contrary," *id.* at 165-166, and it held, consistent with the common law, that the causation standard is the same for both parties, *id.* at 166-171. The petitioner in *Sorrell* had also asked the Court to decide what the causation standard is, and to hold that both the plaintiff and the defendant must prove proximate causation. The Court declined to address that question, however, because it had not granted certiorari to do so. *Id.* at 163-165.

Two concurring opinions in *Sorrell* did address the standard of causation. In one, Justice Souter, joined by Justices Scalia and Alito, noted that this Court's decision in *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957), had engendered a conflict among lower courts on whether FELA requires proximate causation. 549 U.S. at 173 & n.*. Justice Souter went on to explain that proximate cause was the common-law rule before FELA; that FELA did not abrogate it; that this Court consistently applied the rule in FELA cases throughout the first half of the 20th century; and that *Rogers* involved *multiple* causation, not the requisite *directness* of a cause, and thus did not adopt a different rule. *Id.* at 173-177. In an opinion concurring in the judgment, Justice Ginsburg disagreed. She took the position that the FELA causation standard articulated in *Rogers*—that an employee may recover if the railroad's negligence "played any part, even the slightest," in producing the injury—is more "relaxed" than the traditional proximate-cause standard. *Id.* at 177-178 (quoting *Rogers*, 352 U.S. at 506; emphasis omitted).

Since *Sorrell*, the lower courts have continued to render conflicting decisions on the causation issue—including the decision below. After examining the issue at length, the Seventh Circuit "decline[d] to hold that *** common-law proximate causation is required to establish liability under the FELA," and thus determined that the district court did not "commit[] instructional error in refusing [the railroad's] proffered instruction" on proximate cause. App., *infra*, 39a. The court of appeals acknowledged, however, that the three-Justice concurrence in *Sorrell* has "considerable force" and that a number of state courts of last resort "still apply traditional formulations of proximate cause in FELA cases." *Id.* at 35a & n.7. One such court is the Supreme Court of Utah, which reached that conclusion based on an equally thorough analysis just six months earlier in *Raab* v. *Utah Railway*, 221 P.3d 219 (Utah 2009). In adopting the contrary view, the Seventh Circuit stated that this Court "has not explained in detail how broadly or narrowly *Rogers* should be read"; that the Court "did not address, much less decide, the [proximate-cause] issue" in *Sorrell*; and that it would be inappropriate for the court of appeals "to anticipate future actions of the Supreme Court." App., *infra*, 18a, 36a.

The "significant" question whether FELA requires proof of proximate causation, *Sorrell*, 549 U.S. at 165, is thus ripe for definitive resolution by this Court. And this case squarely presents the question. Indeed, the case satisfies all the criteria for certiorari. *First*, the question presented has divided lower courts, both before *Sorrell* and after. *Second*, the question is an important and recurring one. The standard of causation is potentially at issue in each of the thousands of FELA cases filed annually, at

every stage of the litigation, as well as in every case brought under the Jones Act, which incorporates FELA principles. *Third*, this case is an ideal vehicle for deciding the question. The trial evidence permits a finding that the railroad's negligence was merely a "but for" and not a proximate cause of the employee's injury, and thus the outcome may have been different if the jury had been instructed that proximate causation is a prerequisite to recovery. *Fourth*, for the reasons explained in the three-Justice concurrence in *Sorrell*, the court of appeals' decision is incorrect. FELA incorporates the common-law principle of proximate causation, as this Court has repeatedly held.

A. Statutory Background

Enacted in 1908, FELA provides the compensation scheme for injuries sustained by railroad employees in the workplace. The Act provides for concurrent jurisdiction of state and federal courts, 45 U.S.C. § 56, but substantively FELA actions are governed by federal law, *Sorrell*, 549 U.S. at 165.

FELA is a negligence statute. Section 1 provides that

> [e]very common carrier by railroad *** shall be liable in damages to any person suffering injury while he is employed by such carrier *** for such injury *** resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

45 U.S.C. § 51. The basic elements of a FELA cause of action are thus duty, breach, injury, and causation. See, *e.g.*, *Sorrell*, 549 U.S. at 169.[1]

FELA employs a regime of comparative negligence. Under Section 1 of the Act, a railroad is liable even if the employee's injury resulted only "in part" from the railroad's negligence. 45 U.S.C. § 51. And under Section 3, "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53.

B. Factual Background

In addition to transporting freight over long distances, petitioner CSX Transportation, Inc. (CSXT) makes "local" runs that pick up individual rail cars for long-distance transportation or deliver cars to their final destinations. At each stop on a local run, cars are added to or removed from the train in a process known as "switching," which requires more frequent starts and stops than a long-distance journey. App., *infra*, 2a.

Trains use multiple braking systems in slowing to a stop. The "automatic brake" slows the cars of the train, while a separate "independent brake" slows the locomotives. The automatic brake normally activates the independent brake as well, and careless use of the former can cause the locomotives to brake too quickly, leading the rear cars to run into

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[1] The elements of duty and breach can be satisfied by a showing that the defendant violated certain safety statutes (*e.g.*, the Safety Appliance Act, 49 U.S.C. §§ 20301-20306). See, *e.g.*, *Norfolk & W. Ry. v. Hiles*, 516 U.S. 400, 409 (1996).

the front ones. To slow a long train, engineers apply the automatic brake while releasing the independent brake, a maneuver known as "actuating" or "bailing off" the independent brake. Standard practice is to actuate the independent brake for four seconds per locomotive. App., *infra*, 2a.

On certain models of heavier, "wide-body" locomotives, the independent brake is actuated by pressing a button on the side of the brake handle. On some smaller, "conventional" locomotives, engineers actuate the independent brake by pushing the handle down with one hand. App., *infra*, 2a-3a.

Respondent McBride was a locomotive engineer for CSXT. On April 12, 2004, he was assigned to a local run on a train with five locomotives, including a wide-body locomotive in the lead. Towards the end of the run, McBride reached to release the independent brake and hit his hand on the brake handle. The injury produced swelling and pain. McBride sued CSXT under FELA, alleging that the train assigned to him was unsafe for switching and that his repeated pressing and holding of the actuator button had fatigued his hand, causing the injury. App., *infra*, 3a-5a.

C. Proceedings In The District Court

1. At trial, McBride's theory of negligence was that the type and number of locomotives on his train increased the risk of derailment or collision. McBride's railroad expert, Paul Byrnes, testified that wide-body locomotives have diminished visibility and more difficulty on curved tracks. App., *infra*, 55a-57a. Byrnes also expressed the opinion that the use of five locomotives required careful braking, other-

wise, he said, the locomotive brakes could be damaged, the cars could "sling-shot out," and there would be "a very good chance of breaking knuckles [between the cars] and even possibly putting something on the ground." *Id.* at 54a-55a, 57a-58a. McBride himself testified that he was concerned about the type and number of locomotives because he had not been trained to switch with a wide-body engine and feared that the extra weight of the locomotives could cause the rear cars "to come in and hit the engines and maybe jackknife them off the track." *Id.* at 60a-62a.

There was no derailment or collision in this case, however. McBride's theory of causation, as his lawyer expressed it in his summation, was that the injury to his hand "never would have happened but for the defendant giving him that train." App., *infra*, 67a. Elaborating on this "but for" theory, McBride's lawyer told the jury that, if he had been "given the right locomotive and the right train setup" (*i.e.*, fewer and narrower locomotives), McBride would "never have had to make these repetitive movements and grips with his right arm" and thus would "never have hit his [fatigued] hand" on the brake. *Id.* at 66a-67a.

2. McBride's proffered jury instruction 4, on causation, made no reference to proximate causation. It stated:

> Defendant "caused or contributed to" Plaintiff's injury if Defendant's negligence played a part—no matter how small—in bringing about the injury. The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence.

App., *infra*, 5a, 70a.

CSXT objected to the charge, arguing that it was "a misstatement of the causation standard." App., *infra*, 62a. In response, McBride pointed out that it was "a pattern instruction unmodified from the Seventh Circuit." *Id.* at 63a. The commentary to the pattern instruction cites *Rogers* for the proposition that "[t]he common law standard of proximate cause does not apply" in FELA actions. 7th Cir. Pattern Civil Jury Instrs. § 9.02 cmt. a. The district court ruled that it was "going to give [the instruction] over objection." App., *infra*, 63a.

CSXT's proffered jury instruction 15 would have required McBride to prove proximate causation. It stated:

> In order to establish that an injury was caused by the defendant's negligence, the plaintiff must show that (i) the injury resulted "in whole or in part" from the defendant's negligence, and (ii) the defendant's negligence was a proximate cause of the injury.

App., *infra*, 6a, 73a.

CSXT argued that the proffered charge reflected "the proper standard for causation as set forth by the Supreme Court opinions that are cited" in the charge, which hold that FELA requires proximate causation. App., *infra*, 64a; see *id.* at 73a. McBride objected, "based on the same reasons" he had previously stated. *Id.* at 64a. The district court denied

the requested instruction for the "[s]ame reasons." *Ibid.*[2]

3. In the charge it delivered, the district court paraphrased Section 1 of FELA, instructing the jury that the Act imposes liability

> where the injury results, in whole or in part, from the negligence of any of the officers, agents or other employees of the railroad.

App., *infra*, 64a. Dividing that language into FELA's basic elements, the court next told the jury that McBride was required to prove that

> 1, the defendant was negligent, and 2, defendant's negligence caused or contributed to plaintiff's injuries.

Id. at 65a.

The district court then delivered McBride's proffered instruction, approved at the charging conference, on the element of causation. The court informed the jury that

> [d]efendant "caused or contributed to" plaintiff's injury if defendant's negligence played a part—no matter how small—in bringing about the injury.

App., *infra*, 65a. The court did not give CSXT's proffered instruction on proximate causation or otherwise mention that concept during the charge.

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[2] The court also rejected CSXT's instruction 14, on contributory negligence, which likewise would have required a finding of proximate causation, and CSXT's instruction 11, which defined proximate cause. App., *infra*, 63a-64a, see *id.* at 71a-72a.

4. The jury ultimately returned a verdict for McBride, finding that CSXT was negligent and that its negligence caused or contributed to his injury. The jury also found McBride to have been contributorily negligent. It awarded damages of $275,000, of which 67 percent was attributed to CSXT's negligence and 33 percent to McBride's. The district court entered judgment in the amount of $184,250. It subsequently denied CSXT's post-trial motion, which argued, among other things, that CSXT was entitled to a new trial because the court failed to give an instruction on proximate cause. App., *infra*, 7a, 41a-46a, 68a-69a.

D. The Court Of Appeals' Decision

CSXT appealed, arguing that FELA requires proof of proximate causation. The court of appeals rejected that argument and affirmed. App., *infra*, 1a-40a. Although the court stated that "the question we must resolve is whether Section 1 of the FELA *** abrogates the common-law rule of proximate cause," *id.* at 7a, the thrust of the court's opinion was not so much that FELA does abrogate the rule as that it would be inappropriate for a lower court to hold that it does not. The court recognized that there was much to be said for the view that proximate causation is an element of a FELA plaintiff's case, but suggested that only this Court could so hold.

1. The court of appeals acknowledged that, "[a]bsent express language to the contrary, the elements of a FELA claim are determined by reference to the common law"; that "[p]roximate causation is not explicitly mentioned in the statute"; and that this Court "never has identified proximate causation as among those principles of common law that have

been abrogated by the FELA." App., *infra*, 35a (quoting *Sorrell*, 549 U.S. at 165-166). The court also acknowledged that this Court's early decisions "required that the [plaintiff's] injury be a direct or proximate result of *** the negligent act[] in order for liability under the FELA to be imposed" and that those cases "never have been overruled explicitly." *Id.* at 11a-12a.

In particular, the court of appeals observed, this Court's decision in *Rogers* did not "explicitly overrul[e] earlier FELA cases that had spoken in terms of common-law proximate cause." App., *infra*, 18a. The court went on to say that, while some lower courts have interpreted *Rogers* to "relax[] the proximate cause requirement," *this* Court "has not explained in detail how broadly or narrowly *Rogers* should be read." *Id.* at 18a, 23a. And the court identified a reason for *not* reading *Rogers* to have abandoned proximate cause—namely, that *Rogers* "involved multiple causes," not the requisite directness of a cause, and addressed "the issue of when a case with multiple causes must be submitted to a jury." *Id.* at 35a-36a.

The court of appeals thus acknowledged that the three-Justice concurrence in *Sorrell* has "considerable force." App., *infra*, 35a. Indeed, the court believed that "there is some indication that, had it reached the substantive issue, at least some [other] members of the majority [in *Sorrell*] may have been sympathetic to Justice Souter's view" as well. *Id.* at 36a.

2. The court of appeals nevertheless concluded that four "countervailing considerations" prevented it from holding that FELA requires proximate causation. App., *infra*, 36a. *First*, the court pointed out

that it "ha[s] been admonished not to anticipate future actions of the Supreme Court." *Ibid.* The court relied on that consideration even though (a) the import of the admonition is that a lower court is obliged to follow decisions of this Court that have not been "expressly overrule[d]," *United States* v. *Hatter*, 532 U.S. 557, 567 (2001), and (b) the court acknowledged that this Court's decisions holding that a FELA plaintiff must prove proximate causation have not been expressly overruled.

Second, the court of appeals stated that it "must treat with great respect the prior pronouncements of the Supreme Court"—including the statement in *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543 (1994), that "a relaxed standard of causation applies under FELA"—"even if those pronouncements are technically dicta." App., *infra*, 37a. The court implicitly rejected CSXT's arguments that earlier holdings of this Court control over later dicta, Pet. C.A. Reply Br. 14 n.3, and that, in any event, *Gottshall*'s "relaxed standard" dictum is best understood as a reference to *Rogers*' holding that FELA allows recovery even when the railroad bears only a small proportion of responsibility for the injury, Pet. C.A. Br. 39.

Third, the court of appeals expressed concern that a holding in CSXT's favor "would cause a conflict with every other [federal] court of appeals," each of which "ha[s] taken the view, based on *Rogers*, that there is a 'relaxed' standard of [causation] under the FELA." App., *infra*, 38a. The court relied on that consideration despite the fact that, like *Gottshall*, "many of these cases simply recite 'the general proposition that FELA employs a "relaxed standard" of causation, without discussing (or even mentioning)

proximate cause,'" *id.* at 25a n.6 (quoting Pet. C.A. Reply Br. 19), and despite the court's recognition that a number of state courts of last resort "still apply traditional formulations of proximate cause in FELA cases," *id.* at 35a n.7.

Fourth, the court of appeals believed that "[c]ongressional inaction, in the wake of *Rogers* and circuit law broadly interpreting *Rogers*, counsels against adopting a common-law formulation of [proximate] cause in FELA cases." App., *infra*, 38a-39a. The court implicitly rejected CSXT's argument that congressional inaction is "a particularly dangerous ground on which to rest an interpretation of a *** statute," because "several equally tenable inferences may be drawn from [it]," including, in this case, "the inference that the existing legislation already incorporated" a proximate-cause requirement. Pet. C.A. Reply Br. 22-23 (quoting *United States* v. *Craft*, 535 U.S. 274, 287 (2002)).

REASONS FOR GRANTING THE PETITION

This case presents the question that the Court reserved in *Norfolk Southern Railway* v. *Sorrell*, 549 U.S. 158 (2007); that divided four concurring Justices in *Sorrell*; that divided lower courts before *Sorrell*; and that has continued to divide them since: whether, to recover under FELA, a railroad employee must prove that the railroad's negligence was a proximate cause of the employee's injury. The lower courts and Justices that have answered that question yes have relied on this Court's settled interpretive methodology, under which FELA incorporates common-law principles unless it expressly provides otherwise, and on nearly 50 years' worth of this Court's precedents, which hold that FELA incorporates the common-law principle of proximate causation. The lower courts

and Justice that have answered the question no have relied principally on *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957), which they have interpreted to abrogate traditional proximate causation and effectively overrule a half century of precedents.

The Court should grant certiorari in this case to resolve, once and for all, the issue left open in *Sorrell*. There is a longstanding and ongoing conflict on the issue, which can arise in every FELA case, at every stage of the litigation, as well as in every Jones Act case. The issue is squarely presented in *this* case, in which the evidence permits a finding that CSXT's negligence was merely a "but for" and not a proximate cause of McBride's injury. And the court of appeals decided the issue incorrectly. Indeed, by endorsing much of the reasoning in the three-Justice *Sorrell* concurrence, but taking the position that its hands are tied by post-*Rogers* dicta and the prohibition on anticipating future actions of this Court, the court of appeals essentially invited the Court to decide the issue.

A. FELA Requires Proof Of Proximate Causation

FELA requires proximate causation—"some direct relation between the injury asserted and the injurious conduct alleged," *Hemi Group, LLC* v. *City of New York*, 130 S. Ct. 983, 989 (2010) (internal quotation marks omitted)—for two related reasons. *First*, as this Court's decision in *Sorrell* confirms, FELA presumptively incorporates common-law principles; proximate causation is a bedrock principle of common-law negligence; and there is nothing in FELA that abrogates it. *Second*, consistent with the settled interpretive methodology, this Court has

repeatedly held that proximate causation is an element of a FELA claim; as the three-Justice concurrence in *Sorrell* explained, *Rogers* did not hold otherwise; and no post-*Rogers* decision of this Court has done so either.

1. Under long-settled precedent, the elements of a FELA claim, and the defenses to such a claim, are determined "by reference to the common law," unless the Act includes "express language to the contrary." *Sorrell*, 549 U.S. at 165-166; *accord, e.g.*, *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 145 (2003); *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543-444 (1994). Express language in FELA abrogates several "common-law tort defenses that had effectively barred recovery by injured workers," *Gottshall*, 512 U.S. at 542-543—namely, the fellow-servant rule, contributory negligence, assumption of risk, and exemption from the Act through contract, 45 U.S.C. §§ 51, 53-55. Otherwise, however, FELA is "founded on common-law concepts." *Urie* v. *Thompson*, 337 U.S. 163, 182 (1949).

"Prior to FELA, it was clear common law that a plaintiff had to prove that a defendant's negligence caused his injury proximately, not indirectly or remotely." *Sorrell*, 549 U.S. at 173 (Souter, J., concurring); see, *e.g.*, 3 John D. Lawson, *Rights, Remedies & Practice* § 1028, at 1740 (1890); 1 Thomas G. Shearman & Amasa A. Redfield, *A Treatise on the Law of Negligence* § 26, at 27 (5th ed. 1898). That of course remains the rule today. See, *e.g.*, 1 Dan B. Dobbs, *The Law of Torts* § 180, at 443 (2001); W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 41, at 263 (5th ed. 1984). The requirement of proximate causation reflects the recognition that,

"[i]n a philosophical sense, *** the causes of an event go back to the dawn of human events, and beyond"; that "any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts"; and that a "boundary must [therefore] be set to liability for the consequences of any act," Keeton, *supra*, § 41, at 264.

As the court of appeals correctly recognized (App., *infra*, 35a), there is no language in FELA, much less *express* language, that dispenses with the common-law requirement of proximate cause. On the contrary, "FELA sa[ys] nothing *** about the familiar proximate cause standard." *Sorrell*, 549 U.S. at 174 (Souter, J., concurring). As far as causation is concerned, FELA provides only that an employee may recover for an injury "resulting in whole or in part" from the railroad's negligence. 45 U.S.C. § 51. That language authorizes recovery when the railroad's negligence is merely *one of the causes* of the plaintiff's injury, but it says nothing about the requisite *directness* of a cause. As the Court explained in *Sorrell*, the words "make clear that there could be recovery against the railroad even if it were only partially negligent." 549 U.S. at 170.

2. a. In the period "between FELA's enactment and the decision in *Rogers*," this Court "consistently recognized and applied proximate cause as the proper standard in FELA suits." *Sorrell*, 549 U.S. at 174 (Souter, J., concurring). The Court not only recognized and applied the standard, but stated it in the clearest possible terms. "In order to recover under [FELA]," the Court said, "it [i]s incumbent upon [the plaintiff] to prove that [the defendant] was negligent and that such negligence was the proximate cause in whole or in part of the *** accident." *Tennant* v. *Peo-*

ria & Pekin Union Ry., 321 U.S. 29, 32 (1944). The Court made clear that "but for" causation was insufficient, explicitly contrasting negligence that is the "proximate cause" of an injury with negligence that "merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury." *Davis* v. *Wolfe*, 263 U.S. 239, 243 (1923). Altogether, the Court applied the proximate-cause standard in more than 15 FELA cases through the middle of the 20th century.[3]

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[3] In addition to the cases cited in the text, see *Norfolk & W. Ry.* v. *Earnest*, 229 U.S. 114, 118-119 (1913) (jury was "rightly" instructed that, "if the said engineer did not exercise *** reasonable care and caution, and his failure so to do was the proximate cause of the accident, then [you] must find for the plaintiff"); *St. Louis, Iron Mountain & S. Ry.* v. *McWhirter*, 229 U.S. 265, 280 (1913) ("it must be shown that the alleged negligence was the proximate cause of the damage"); *Lang* v. *N.Y. Cent. R.R.*, 255 U.S. 455, 461 (1921) (jury's verdict must be reversed because "the collision was not the proximate result of the defect"); *Minneapolis, St. Paul & Sault Ste. Marie Ry.* v. *Goneau*, 269 U.S. 406, 410-411 (1926) ("As there was substantial evidence tending to show that the defective coupler was a proximate cause of the accident ***, the case was rightly submitted to the jury ***."); *St. Louis-San Francisco Ry.* v. *Mills*, 271 U.S. 344, 347 (1926) ("Nor is there evidence from which the jury might infer that petitioner's [negligence] was the proximate cause of decedent's death."); *N.Y. Cent. R.R.* v. *Ambrose*, 280 U.S. 486, 489 (1930) (plaintiff "failed to prove that the accident was proximately due to the negligence of the company"); *Nw. Pac. R.R.* v. *Bobo*, 290 U.S. 499, 503 (1934) ("If petitioner was negligent ***, there is nothing whatsoever to show that this was the proximate cause of the unfortunate death."); *Swinson* v. *Chi., St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529, 531 (1935) ("The Safety Appliance Act *** give[s] a right of recovery [under FELA] for every injury the proximate cause of which was a failure to comply with a requirement of the act."); *Tiller* v. *Atl. Coast Line R.R.*, 318 U.S. 54, 67 (1943) (FELA

b. Contrary to the view of some lower courts, this Court did not "smuggle[] proximate cause out of *** FELA" in *Rogers*. *Sorrell*, 549 U.S. at 173 n.* (Souter, J., concurring). That case "did not address, much less alter, existing law governing the degree of causation necessary for redressing negligence." *Id.* at 173 (Souter, J., concurring).

(i) At common law, a plaintiff's contributory negligence "operated as an absolute bar to relief." *Sorrell*, 549 U.S. at 166. FELA abolished that defense, replacing it with the doctrine of comparative negligence. *Gottshall*, 512 U.S. at 542. As the court of appeals correctly recognized (App., *infra*, 35a-36a), *Rogers* concerned that principle, and multiple causation more generally.

Quoting FELA's comparative-negligence provisions, 352 U.S. at 506 n.12, 507 & n.14, this Court

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"leave[s] for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury"), *Brady* v. *S. Ry.*, 320 U.S. 476, 483 (1943) ("evidence of the unsuitability of the rail for ordinary use *** would justify a finding for [the plaintiffs], if the defective rail was the proximate cause of the derailment"); *Coray* v. *S. Pac. Co.*, 335 U.S. 520, 523 (1949) (plaintiff "was entitled to recover if this defective equipment was the sole or a contributory proximate cause of the decedent employee's death"); *Urie*, 337 U.S. at 177 (complaint stated claim under FELA because "[a]ll the usual elements [we]re comprehended, including want of due or ordinary care, proximate causation of the injury, and injury"); *O'Donnell* v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390 (1949) ("a failure of equipment to perform as required by the Safety Appliance Act is *** an actionable wrong, *** for the proximate results of which there is liability [under FELA]"); and *Carter* v. *Atlanta & St. Andrew's Bay Ry.*, 338 U.S. 430, 435 (1949) ("if the jury determines that the defendant's breach is 'a contributory proximate cause' of injury, it may find for the plaintiff").

explained in *Rogers* that a railroad is liable if its negligence "played any part, even the slightest," in producing the employee's injury, regardless of whether the injury also had "other causes, including the employee's contributory negligence," *id.* at 506. The Court ultimately held that the evidence in the case supported a finding that the defendant's negligence "played a part" in the plaintiff's injury. *Id.* at 503. *Rogers* thus addressed only the question of "how to proceed when there are multiple cognizable causes of an injury." *Sorrell*, 549 U.S. at 173 (Souter, J., concurring). It did not address "the necessary directness of cognizable causation." *Id.* at 175.

The statutory "in whole or in part" language applied in *Rogers* had always been part of FELA, and this Court had consistently interpreted the Act to require proximate causation. Indeed, the Court had explicitly stated that FELA requires proof that the defendant's negligence was the "proximate cause in whole or in part" of the plaintiff's injury, *Tennant*, 321 U.S. at 32, thereby confirming that directness of causation ("proximate cause") and multiplicity of causation ("in whole or in part") are distinct. *Rogers* merely clarified that "in part" means in "any part, even the slightest." 352 U.S. at 506.

(ii) Far from having rejected proximate causation, *Rogers* assumed that it is an element of a FELA claim. For example, the jury instructions in the case required a verdict for the defendant if the plaintiff's own negligence was the "sole proximate cause" of his injuries and the injuries were not "directly contributed to or caused" by the defendant's negligence. *Rogers*, 352 U.S. at 505 n.9. That aspect of the instruction was "free of controversy" and one with

which the Court "took no issue." *Sorrell*, 549 U.S. at 176 (Souter, J., concurring). Indeed, in sustaining the jury's finding of liability, the Court assumed that "the verdict was obedient to the trial judge's charge." *Rogers*, 352 U.S. at 505.

"The absence of any intent to water down the common law requirement of proximate cause is [also] evident from the prior cases on which *Rogers* relied." *Sorrell*, 549 U.S. at 175 (Souter, J., concurring). Thus, for the proposition that the test under the Act is whether the defendant's negligence "played any part, even the slightest," in producing the plaintiff's injury, *Rogers*, 352 U.S. at 506, the Court cited *Coray* v. *Southern Pacific Co.*, 335 U.S. 520, 523 (1949), which holds that a FELA plaintiff may recover if the defendant's negligence was "the sole or a contributory proximate cause" of the injury. See *Rogers*, 352 U.S. at 506 n.11. And for the proposition that the question in a FELA case is whether a jury may reasonably conclude that the defendant's negligence "played any part at all" in the plaintiff's injury, *id.* at 507, the Court cited *Carter* v. *Atlanta & St. Andrews Bay Railway*, 338 U.S. 430, 435 (1949), which holds that a jury may find for a FELA plaintiff if it determines that the defendant's negligence is "a contributory proximate cause" of the injury. See *Rogers*, 352 U.S. at 507 n.13.

Rogers is thus "no authority for anything less than proximate causation in an action under FELA." *Sorrell*, 549 U.S. at 177 (Souter, J., concurring). Consistent with common-law principles as qualified by the statutory language ("in whole or in part"), the holding of the case is not that a FELA defendant's negligence need not be a proximate cause of the

plaintiff's injury, but that it need not be the *sole* proximate cause.

c. In her concurrence in *Sorrell*, Justice Ginsburg relied on two post-*Rogers* decisions—*Crane* v. *Cedar Rapids & Iowa City Railway*, 395 U.S. 314 (1969), and *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994)—to support the view that FELA causation is more "relaxed" than ordinary proximate causation. 549 U.S. at 177-178. But neither case so held.

In *Crane*, the Court cited *Rogers* for the proposition that a FELA plaintiff "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's [negligence]." 395 U.S. at 166. That statement is dictum, because the suit against the railroad was filed by a *non*-employee, and thus the issue of causation was governed by state law rather than FELA. *Id.* at 166-167. In any event, the statement is properly read to mean only that FELA does not embody the common-law concept of *sole* proximate causation, as the Court's quotation of the Act's "in whole or in part" language confirms.

In *Gottshall*, the Court cited *Rogers* for the proposition that "a relaxed standard of causation applies under FELA." 512 U.S. at 543. That statement, too, is dictum, because *Gottshall* involved an issue—the standard for negligent infliction of emotional distress—that did not require the Court to express a view on causation. In any event, the illustrative language that immediately followed the statement—the quotation from *Rogers* that the employer's negligence need only have "played any part, even the slightest, in producing the injury," *ibid.* (quoting 352 U.S. at

506)—is consistent with the proper understanding of *Rogers* (*i.e.*, that it is a case about multiple causes).

The court of appeals recognized that these statements are dicta, but believed that they are nevertheless entitled to "great respect." App., *infra*, 37a. Earlier *holdings* that FELA requires proximate causation, however, control over later dicta, and, in any event, the dicta can be reconciled with the holdings, for the reasons explained above. At the very least, any conflict between this Court's pre-*Rogers* holdings and its post-*Rogers* dicta provides an additional reason to grant certiorari, so that railroads, their employees, and lower courts may know which of them control. The Seventh Circuit suggested as much, when it stated that it would not itself hold that FELA requires proximate causation because it has been "admonished not to anticipate future actions of the Supreme Court." *Id.* at 36a.[4]

B. The Question Whether FELA Requires Proximate Causation Has Divided The Lower Courts

1. As the three-Justice concurrence in *Sorrell* observed, *Rogers* has generated a conflict among the

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[4] The court of appeals also believed that "[c]ongressional inaction, in the wake of *Rogers* and circuit law broadly interpreting *Rogers*, counsels against adopting a common law formulation of [proximate] cause in FELA cases." App., *infra*, 38a-39a. But "congressional inaction *** deserve[s] little weight in the interpretive process." *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001) (internal quotation marks omitted). In any case, this Court's only square holdings on point are that FELA requires proximate causation, and there is no consensus in the lower courts on that issue. If anything is to be inferred from Congress's failure to change FELA's causation standard, therefore, it is that Congress does not disapprove of this Court's *holdings*.

lower courts on whether FELA requires proof of proximate causation. See 549 U.S. at 173 n.*. Six Circuits—the Second, Fifth, Sixth, Seventh, Ninth, and Tenth—and two state courts of last resort—those of Florida and Texas—have concluded that a FELA plaintiff need not prove proximate causation.[5] At least one Circuit—the First—and eight state courts of last resort—those of Alabama, Iowa, Minnesota, Montana, Nebraska, Ohio, Utah, and West Virginia—have reached the opposite conclusion.[6]

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[5] See *Marchica* v. *Long Island R.R.*, 31 F.3d 1197, 1207 (2d Cir. 1994) ("in the FELA context the traditional concept of proximate cause is supplanted"); *Page* v. *St. Louis Sw. Ry.*, 312 F.2d 84, 89 (5th Cir. 1963) (there has been "[a] definite departure from traditional common-law tests of proximate causation as applied to [FELA]"); *Churchwell* v. *Bluegrass Marine, Inc.*, 444 F.3d 898, 907 (6th Cir. 2006) (FELA plaintiff "need not establish proximate causation"); App., *infra*, 39a (Seventh Circuit's decision below) ("we decline to hold that *** common-law proximate causation is required to establish liability under the FELA"); *Ogelsby* v. *S. Pac. Transp. Co.*, 6 F.3d 603, 609 (9th Cir. 1993) ("'proximate cause' is not required to establish causation under the FELA"); *Summers* v. *Mo. Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997) ("analyz[ing] liability under the FELA in terms of proximate causation" has been "definitively abandoned"); *McCalley* v. *Seaboard Coast Line R.R.*, 265 So.2d 11, 15 (Fla. 1972) ("the concept of proximate cause no longer has any place in an action under [FELA]"); *Dutton* v. *S. Pac. Transp.*, 576 S.W.2d 782, 785 (Tex. 1978) ("common law 'proximate cause' is not a proper test of the evidence in F.E.L.A. cases").

[6] See *Boston & Me. R.R.* v. *Talbert*, 360 F.2d 286, 288 (1st Cir. 1966) ("the plaintiff has the burden of proving negligence and proximate cause"); *CSX Transp., Inc.* v. *Miller*, ___ So.3d ___, 2010 WL 996541, at *13 (Ala. Mar. 19, 2010) ("the jury in this case was properly instructed by the trial court that Miller could not be compensated for any injury not proximately caused by CSX's negligence"); *Snipes* v. *Chicago, Cent. & Pac. R.R.*, 484 N.W.2d 162, 164 (Iowa 1992) ("Recovery under the FELA re-

Federal district courts in other Circuits and intermediate state appellate courts in other States are likewise divided on the question.[7]

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quires an injured employee to prove that the defendant employer was negligent and that the negligence proximately caused, in whole or in part, the accident."); *Brabeck* v. *Chicago & Nw. Ry.*, 117 N.W.2d 921, 923 (Minn. 1962) ("violation of an operating rule may impose liability on an employer if it is the proximate cause of the accident"); *Marazzato* v. *Burlington N. R.R.*, 817 P.2d 672, 675 (Mont. 1991) ("The plaintiff has the burden of proving that defendant's negligence was the proximate cause in whole or in part of plaintiff's [death]."); *Ballard* v. *Union Pac. R.R.*, 781 N.W.2d 47, 53 (Neb. 2010) ("to recover under FELA, an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury"); *Reed* v. *Pa. R.R.*, 171 N.E.2d 718, 721 n.3 (Ohio 1961) ("In order to support recovery [under FELA] ***, a violation of the Safety Appliance Act *** must amount to a proximate cause of [the] injury, although it need not be *the* proximate cause thereof."); *Raab* v. *Utah Ry.*, 221 P.3d 219, 225 (Utah 2009) (declining to "read[] *Rogers* as eliminating the common law proximate cause requirement"); *Gardner* v. *CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W. Va. 1997) ("[T]o prevail on a claim under [FELA], a plaintiff employee must establish that the defendant employer acted negligently and that such negligence contributed proximately, in whole or in part, to plaintiff's injury.").

[7] Compare, *e.g.*, *Grothusen* v. *Nat'l R.R. Passenger Corp.*, 603 F. Supp. 486, 488 n.4 (E.D. Pa. 1984) (proximate cause not required); *Magelky* v. *BNSF Ry.*, 579 F. Supp. 2d 1299, 1306 (D.N.D. 2008) (same); *Hall* v. *Norfolk S. Ry.*, 829 F. Supp. 1571, 1578 (N.D. Ga. 1993) (same); *Fontaine* v. *Nat'l R.R. Passenger Corp.*, 63 Cal. Rptr. 2d 644, 647 (Ct. App. 1997) (same); *Albin* v. *Ill. Cent. R.R.*, 660 N.E.2d 994, 999 (Ill. App. Ct. 4th Dist. 1995) (same); *Hamilton* v. *CSX Transp., Inc.*, 208 S.W.3d 272, 278 (Ky. App. 2006) (same); *Jackson* v. *Kansas City S. Ry.*, 619 So. 2d 851, 858 (La. App. 1993) (same); *Boyt* v. *Grand Trunk W. R.R.*, 592 N.W.2d 426, 431 (Mich. App. 1998) (same); *Whitley* v. *S. Pac. Transp. Co.*, 902 P.2d 1196, 1201 (Or. App. 1995) (same), with, *e.g.*, *Moore* v. *Chesapeake & Ohio Ry.*, 493 F. Supp. 1252, 1265 (S.D. W. Va. 1980) (proximate cause re-

Trial courts must "instruct the jury on the proper legal standard" in FELA cases. *CSX Transp., Inc.* v. *Hensley*, 129 S. Ct. 2139, 2141 (2009) (per curiam). As a consequence of the divergent interpretations of *Rogers*, FELA juries in some jurisdictions receive proximate-cause instructions, while those in others do not. Even among States and Circuits in which there is no controlling appellate decision, pattern instructions differ on the issue, as do instructions that have been given in particular cases. Unlike those of some other States and Circuits, for example, Virginia's pattern instructions permit a jury to find for the employee only if the railroad's negligence "was the proximate cause of or proximately contributed to cause [the employee's injury]." 1 Va. Prac. Jury Instr. § 40:1 (4th ed. 2009). See generally *Sorrell*, 549 U.S. at 167 n.2 (cataloguing pattern causation instructions). And in a FELA case tried just a few months ago, a Mississippi trial court gave the precise proximate-cause instruction that the district court refused to give here. Compare App., *infra*, 77a, with *id.* at 6a, 73a. See also *id.* at 74a (instruction from Maryland trial court that FELA plaintiff may recover only if defendant's negligence "was a proximate cause, in whole or in part, of the [p]laintiff's injury").

2. It is therefore apparent that neither this Court's decision in *Sorrell* nor the dueling concurrences in that case have put the matter to rest. On the contrary, *Sorrell* has merely led lower courts to choose sides in the debate between Justices Souter,

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quired), aff'd, 649 F.2d 1004 (4th Cir. 1981); *Dickerson* v. *Staten Trucking, Inc.*, 428 F. Supp. 2d 909, 915 (E.D. Ark. 2006) (same); *Kelson* v. *Central of Ga. R.R.*, 505 S.E.2d 803, 808 (Ga. App. 1998) (same); *Brooks* v. *Brennan*, 625 N.E.2d 1188, 1193 (Ill. App. Ct. 5th Dist. 1994) (same); *Lehman* v. *Nat'l R.R. Passenger Corp.*, 661 A.2d 17, 19 (Pa. Super. Ct. 1995) (same).

Scalia, and Alito, on the one hand, and Justice Ginsburg, on the other.

Six months before the Seventh Circuit issued its decision here, for example, the Supreme Court of Utah decided *Raab* v. *Utah Railway*, 221 P.3d 219 (Utah 2009). Like the Seventh Circuit's decision, *Raab* undertook a lengthy analysis of whether FELA requires proximate cause, *id.* at 225-230; pointed out that *Rogers*' "any part, even the slightest" formulation has "spawned an extensive debate" among both lower courts and members of this Court, *id.* at 227-228 & nn. 28-29, 33-34; and noted that this Court "has never squarely addressed the issue of *Rogers*'s impact on proximate cause," *id.* at 228. *Un*like the Seventh Circuit, however, the Utah Supreme Court *agreed* with the three-Justice concurrence in *Sorrell* and, as the Seventh Circuit recognized, "held that common-law proximate cause *is* the correct standard of causation under the FELA." App., *infra*, 34a (emphasis added). "While other courts, including the Court of Appeals for the Tenth Circuit, have stated that *Rogers* 'definitively abandoned' the requirement that a FELA plaintiff show proximate cause," the Utah Supreme Court explained, "such an interpretation is not supported by FELA's plain language, not mandated by the Supreme Court's statement in *Rogers*, and inconsistent with the Supreme Court's general interpretive approach to FELA." *Raab*, 221 P.3d at 228-229 (quoting *Summers* v. *Mo. Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997)).

As a result of the Utah Supreme Court's decision, different causation standards now apply in FELA cases, not only *across* States and Circuits, but also *within* the State of Utah itself (which is located in the Tenth Circuit), depending on whether the suit is

filed in state or federal court. The same is true in Ohio (which is located in the Sixth Circuit) and Montana (which is located in the Ninth). That is an intolerable state of affairs, all the more so because one of the very purposes of FELA was to "create uniformity throughout the Union." *Norfolk & W. Ry.* v. *Liepelt*, 444 U.S. 490, 493 n.5 (1980) (internal quotation marks omitted). Indeed, there is particular need to resolve a conflict in the lower courts when, as here, it stems from pervasive confusion over the meaning of one of this Court's decisions.[8]

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[8] The court of appeals acknowledged that there is a division among the lower courts, compare App., *infra*, 25a-26a, with *id.* at 34a n.7, but took the position that "every [federal] court of appeals" has rejected traditional proximate causation and that only three state courts of last resort—those of Montana, Utah, and West Virginia—"still apply" the standard, *id.* at 23a, 35a n.7. Although certiorari would be warranted even if the court of appeals' tally were correct, ours is more accurate.

As to the federal court of appeals cases that the decision below cited for the proposition that FELA does not require proximate causation, App., *infra*, 23a-26a, many of them, like this Court's decision in *Gottshall*, merely state that FELA employs a "relaxed" standard of causation, without discussing (or even mentioning) proximate cause. Like *Gotshall*, those decisions may be referring to *Rogers*' holding that FELA allows recovery even when the railroad bears only a small proportion of responsibility for the employee's injury.

As to the six additional decisions that *we* cite for the proposition that FELA *does* require proximate causation, see *supra* note 6, we respond to the decision below as follows. *First*, both the First Circuit's decision in *Talbert* and the Iowa Supreme Court's decision in *Snipes* explicitly state that proximate cause is required; the language in those decisions on which the court below relied, App., *infra*, 24a n.5, 34a n.7, appears to address the distinct principle—not peculiar to causation—that a FELA plaintiff's claim should ordinarily be decided by a jury. *Second*, the Ohio Supreme Court's decision in *Reed*, the Minnesota Su-

C. The Question Presented Is A Recurring One Of Great Importance

Because FELA "pre-empt[s] state tort remedies," *Sorrell*, 549 U.S. at 165, it is the exclusive remedy for injuries sustained by railroad employees in the workplace. And the remedy is frequently invoked. An average of just under 600 FELA suits were filed each year in federal court alone in the five-year period ending in 2009. See http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary.aspx (Table C-3). That number is merely a fraction of the total number of FELA actions commenced in *all* courts (federal and state), nearly 5,000 of which were filed annually during the ten-year period ending in 2008. See Br. of Ass'n of Am. R.Rs. as *Amicus Curiae* in *CSX Transp., Inc.* v. *Rivenburgh*, No. 08-269 (U.S. Oct. 2, 2008), 2008 WL 4484590, at *9 n.6.

Because causation is a basic element of a FELA claim, moreover, the question whether proximate causation is required can arise in every case. And it can arise at every phase of the litigation: before trial, at the summary-judgment stage; during trial, when the defendant moves for judgment as a matter of law; at the end of trial, when the jury is in-

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preme Court's decision in *Brabeck*, and the Nebraska Supreme Court's decision in *Ballard* likewise state, explicitly, that proximate cause is required; the decisions of the intermediate appellate courts on which the court below relied, *id.* at 35a n.7, are not controlling when there are contrary decisions of higher courts. In any event, the unpublished decision of the Ohio intermediate appellate court addressed the issue of *multiple* causation, not proximate causation, and the decision of the Nebraska intermediate appellate court antedates the Nebraska Supreme Court's decision in *Ballard*. *Third*, the Alabama Supreme Court's holding in *Miller* that FELA requires proximate causation came after the decision below was issued.

structed; after trial, when the defendant renews its motion for judgment as a matter of law; and on appeal, when challenges to jury instructions and the sufficiency of the evidence can be raised again.

The question presented can also arise in all cases brought under the Jones Act, 46 U.S.C. § 30104(a), the law that governs liability for workplace injuries by seamen. In such cases, courts apply the "[l]aws of the United States regulating recovery for personal injury to *** a railway employee," *ibid.*, and this Court has held that the Jones Act "adopts the entire judicially developed doctrine of liability under [FELA]." *American Dredging Co.* v. *Miller*, 510 U.S. 443, 456 (1994) (internal quotation marks omitted).

D. This Case Is An Ideal Vehicle For Deciding The Question

1. Whether FELA requires proximate causation is frequently outcome-determinative. This case illustrates the point, because a properly instructed jury easily could have found that McBride's injury was not proximately caused by any negligence on CSXT's part.

McBride's theory of negligence was that his assigned train—which had five locomotives with a wide-body in the lead—was unsafe because of its propensity to cause derailment or collision, not because of its propensity to cause imprecise hand movements by fatiguing the thumbs of engineers actuating the independent brake. Yet McBride was injured while operating the brake, not in a rail accident. On this record, a properly instructed jury could have found that CSXT had a duty "to take precautions against a different kind of loss from the one

that materialized," *Movitz* v. *First Nat'l Bank*, 148 F.3d 760, 763 (7th Cir. 1998) (Posner, J.), and that any negligence on CSXT's part did not "directly injure[]" McBride, *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258, 269 (1992).

The train assigned to McBride may well have been a necessary condition for his injury. Had there been fewer locomotives, he may have needed less time to bail off the brake; and had a conventional locomotive been in the lead, he may have actuated the brake with his whole hand rather than his thumb. But the existence of a necessary condition does not establish proximate cause. And the jury was never asked to find proximate causation.

McBride's counsel capitalized on the lack of a proximate-cause instruction in his summation. Quoting the district court's charge, he argued: "What we *** have to show is defendant's negligence caused or contributed to [the] injury. It never would have happened *but for* the defendant giving him that train." App., *infra*, 67a (emphasis added). McBride thus asked the jury, in effect, to return a verdict in his favor on the ground that CSXT's negligence created "an incidental condition or situation" that resulted in his injury. *Davis*, 263 U.S. at 243. If the Court grants certiorari in this case and reaffirms that a FELA plaintiff may not recover in that circumstance, CSXT will likely be entitled to a new trial. See *Gooden* v. *Neal*, 17 F.3d 925, 929 (7th Cir. 1994) (Easterbrook, J.) (erroneous failure to give defense instruction on causation is harmless "only if the evidence so favored" the plaintiff that a properly instructed jury "could not find" in favor of the defendant).

2. Among post-*Sorrell* cases in which a petition for certiorari on the proximate-cause issue has been filed, this case is far and away the best vehicle for deciding it. As a consequence of the decision below, there are now two comprehensive lower-court decisions on the issue—the Utah Supreme Court's in *Raab* and the Seventh Circuit's in this case—that have come to opposite conclusions. And no other petition that has been acted upon or filed since the Seventh Circuit's decision presents the issue as squarely as this one.

In *Norfolk Southern Railway* v. *Jordan*, No. 09-788 (cert. denied Apr. 19, 2010), for example, the railroad argued that the jury should have been instructed that the employee must "prove that the railroad's negligence was 'the proximate cause in whole or in part' of the employee's injury." *Jordan* v. *Burlington N. Santa Fe R.R.*, 2009 WL 112561, at *7 (Tenn. Ct. App. Jan. 15, 2009). Unlike the Seventh Circuit in this case, however, the Tennessee Court of Appeals ruled that the trial court correctly refused the instruction, not because FELA does not require proximate cause, but because "the substance of the[] proposed instruction[] was covered in the trial court's instructions." *Ibid.*

Also unlike this case, *Reinauer Transportation Cos.* v. *Brown*, No. 10-56 (pet. for cert. filed July 2, 2010), ultimately concerns multiple causation, not the requisite directness of a cause. As the petition in that case acknowledges (at 11-13, 17-18, 33-34), the issue at trial was whether the employee's injuries were attributable to preexisting medical conditions rather than the accident that gave rise to the suit; there was no dispute that, if the railroad's negligence caused the injuries, it did so directly. And even if the

case does involve proximate causation, the petition essentially concedes (at 34 n.12) that the decision below rests on an independent and adequate state ground.

Finally, in *Conrail* v. *Battaglia*, No. 10-75 (pet. for cert. filed July 13, 2010), the Ohio Court of Appeals should have expressly required proximate cause. But the court's discussion of the causation standard was far more truncated—and also more ambiguous—than the Seventh Circuit's in this case. See *Battaglia* v. *Conrail*, 2009 WL 3325903, at *3, *5 (Ohio Ct. App. Oct. 16, 2009). Whether any error could be deemed reversible in that case, moreover, is not as clear as it is here, where a properly instructed jury unquestionably could have found that the negligence attributed to CSXT was not a direct cause of McBride's injury. Cf. *CSX Transp., Inc.* v. *Begley*, 313 S.W.3d 52, 63-64 (Ky. 2010) ("leav[ing] the question of whether the FELA generally requires a proximate cause instruction for another day," because "[s]uch an instruction was unnecessary under the evidence").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

United States Court of Appeals,
Seventh Circuit.
Robert McBRIDE, Plaintiff-Appellee,
v.
CSX TRANSPORTATION, INC., Defendant-Appellant.
No. 08-3557.
Argued May 29, 2009.
Decided March 16, 2010.

Michael A. Gross, St. Louis, MO, Lawrence M. Mann (argued), Alper & Mann, Bethesda, MD, Robert P. Marcus, Kujawski & Associates, P.C., O'Fallon, IL, for Plaintiff-Appellee.

Dan Himmelfarb (argued), Mayer Brown LLP, Washington, DC, for Defendant-Appellant.

Before RIPPLE, ROVNER and SYKES, Circuit Judges.

RIPPLE, Circuit Judge.

Robert McBride instituted this action under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, seeking compensation for an injury that he sustained while performing switching operations for his employer, CSX Transportation, Inc. ("CSX"). A jury returned a verdict in Mr. McBride's favor, and the district court entered judgment on the jury's verdict. CSX appealed, and, for the reasons set forth in this opinion, we now affirm the judgment of the district court.

I
BACKGROUND

A. Facts

CSX operates an interstate system of railroads. In addition to transporting freight over long distances, it makes "local" runs; that is, it picks up individual rail cars for long-distance transportation or delivers cars to their final destinations. The process of adding or removing cars during these local runs is called "switching." When performing switching operations, engineers are required to start and stop more frequently than when transporting freight over long distances.

Trains use multiple brake systems in slowing to a stop. The automatic brake slows the cars of the train; a separate "independent brake" slows the locomotives. CSX explains the operation of the braking systems in this way:

> The automatic brake normally activates the independent brake as well, and careless use of the former can cause the locomotives to brake too quickly, leading the rear cars to run into those in front. To slow a long train, engineers apply the automatic brake while releasing the independent brake, a maneuver known as "actuating" or "bailing off" the independent brake. Standard practice is to actuate the independent brake for four seconds per locomotive.

Appellant's Br. 7 (citations omitted). On some heavier, "wide-body" locomotives, the independent brake is actuated by pressing a button on the side of the brake handle, located in front of the engineer's seat.

On smaller locomotives, the independent brake is actuated by pushing the handle down with one hand.

Mr. McBride began working for CSX in 1996 as a conductor. In 1999, he became a locomotive engineer, and, from 1999 until 2004, his work consisted primarily of operating a train "from Evansville, Indiana, to Nashville, Tennessee, and back again." Tr. II at 87. However, Mr. McBride was interested in transferring to a different division "where they worked locals," *id.* at 88, because engineers on local runs worked regular, predictable hours and did not often spend nights away from home. Mr. McBride explained that the process of qualifying to operate on a new territory involved being paired with a supervising engineer, who "explains to you as you're running the train where everything is, how the land lays, just the sightings. Explains the whole territory to you." *Id.* at 89.

On April 12, 2004, Mr. McBride went on a qualifying run with supervising engineer, D.J. Baker. The run was going to entail switching in at least four locations. When Mr. McBride saw the train that he would be operating, he was concerned because the two front engines were wide bodies, which were followed by three conventional cabs. Mr. McBride's concern stemmed from the fact that he never had switched with a wide body cab before. *See id.* at 91. Mr. McBride explained that "[t]hey're not used for switching. From Evansville to Nashville, they are used for coal trains and grain trains. So I was never trained to use one for switching. They are not used for that." *Id.* Mr. McBride expressed this concern to Baker. Baker then went to speak with the yardmas-

ter,[1] but the yardmaster instructed Mr. McBride and Baker to "take them as is." *Id.* at 92. Mr. McBride and Baker complied with this instruction.

Mr. McBride's run began at 10:00 a.m. Mr. McBride testified that, at the first stop, he switched cars for approximately two and one-half to three hours. During this time, Mr. McBride testified, he was using the independent brake and the actuation button "the whole time." *Id.* at 95. At the following two stops, Mr. McBride performed switching operations for two hours and one and one-half hours, respectively. Mr. McBride stated that "[j]ust all day long I had been doing that, grabbing it, pushing the button, grabbing it, pushing the button. That's constant what I was doing." *Id.* at 98.

Mr. McBride was performing switching operations at the final stop, at approximately 8:00 p.m., when the following events took place:

> [T]he conductor told me to release the brakes.... [W]hen the independent brakes is [sic] applied, its forward. So I was reaching to release them. By then my hands and everything is [sic] numb because I've been doing it for approximately seven or eight hours constantly.
>
> Now I ran my hand into the independent brake, and it felt like – like somebody threw gas on my hand and set it afire.

Id. at 99. Mr. McBride screamed and immediately put his hand in his cooler. Baker operated the train during their return to Evansville.

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[1] The yardmaster is the manager at the railyard who puts the engines on the trains. *See* Tr. at 90.

Mr. McBride underwent two surgeries on his hand and extensive physical therapy as a result of his injury. He returned to work in February 2005; however, he continued to experience pain, numbness and some limitations in the use of his hand.

B. District Court Proceedings

Mr. McBride eventually sued CSX under the FELA for damages resulting from his injury. His theory of negligence was that, because of the configuration of the trains to which he was assigned, the switching operation required constant use of the actuator button. This use caused his hand to fatigue, and, at some point, due to the fatigue, his hand fell and hit the independent brake.

At trial, Mr. McBride proffered the following instruction on causation, which followed in substance the Seventh Circuit Pattern Instruction.[2] The proffered instruction stated:

> Defendant "caused or contributed to" Plaintiff's injury if Defendant's negligence played a part – no matter how small – in bringing about the injury. The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence.

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[2] The pattern instruction states:

> Defendant "caused or contributed to" Plaintiff's injury if Defendant's negligence played a part – no matter how small – in bringing about the injury. [There can be more than one cause contributing to an injury.] The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence.

Fed. Civ. Jury Instructions of the Seventh Circuit 9.02.

R.43 at 13. The pattern instruction cites as its authority *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957), which, according to the drafters of the instruction, stands for the proposition that a "relaxed standard of causation" applies in FELA cases and that the "common law standard of proximate cause does not apply." Fed. Civ. Jury Instructions of the Seventh Cir. 9.02, cmt.a.

CSX countered with its own causation instruction:

> In order to establish that an injury was caused by the defendant's negligence, the plaintiff must show that (i) the injury resulted "in whole or in part" from the defendant's negligence, and (ii) the defendant's negligence was a proximate cause of the injury.

R.44 at 17. CSX also proffered the following instruction defining "proximate cause":

> When I use the expression "proximate cause," I mean any cause which, in natural or probable sequence, produced the injury complained of. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it causes the injury.

Id. at 14. In support of its proffered instructions, CSX maintained that, in *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158, 127 S. Ct. 799, 166 L. Ed. 2d 638 (2007), the Supreme Court had clarified that *Rogers* had not abandoned common-law proximate cause, and, in fact, proximate cause was the

proper standard for causation in cases under the FELA.

The court rejected CSX's proffered instruction. Instead, the court used Mr. McBride's causation instruction, and the jury returned a verdict in Mr. McBride's favor. After unsuccessfully challenging the jury's verdict before the district court, CSX appealed.

II
ANALYSIS

The central issue in this case is the proper standard for causation under the FELA. Stated another way, the question we must resolve is whether Section 1 of the FELA, 45 U.S.C. § 51, abrogates the common-law rule of proximate cause. We begin with the applicable statutory command. Section 51 of Title 45 provides in relevant part:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, *for such injury or death resulting in whole or in part from the negli-*

> *gence of any of the officers, agents, or employees of such carrier*, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51 (emphasis added). The question of causation centers on the meaning of "resulting in whole or in part from the negligence ... of such carrier." *Id.*

CSX submits that this language does not establish a causation standard. Instead, according to CSX, common-law proximate causation is-and always has been-the proper causation standard under the FELA. Relying heavily on Justice Souter's concurring opinion in *Norfolk Southern Railway v. Sorrell*, 549 U.S. 158, 127 S. Ct. 799, 166 L. Ed. 2d 638 (2007), CSX maintains that the Supreme Court never has abandoned the holdings of its early FELA cases in which it explicitly held that a plaintiff must establish proximate causation in order to recover under the Act. CSX further claims, also in reliance on Justice Souter's concurrence, that the Supreme Court's decision in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957), does not hold to the contrary; according to CSX, *Rogers* did not purport to speak to the question of proximate causation, but only to the question of when a case with multiple causes must be submitted to the jury. CSX acknowledges that other Supreme Court cases, as well as cases in the courts of appeals, have suggested, if not held, that *Rogers* established a relaxed causation standard for FELA cases. It argues, however, that many of these statements are only dicta, but, even if not, they are at odds with both the FELA

itself and the methodology the Court has adopted for interpreting that legislation.

Mr. McBride counters that *Rogers* in fact did interpret the FELA as incorporating a relaxed causation standard. He further points out that subsequent Supreme Court and circuit cases, although perhaps not with an optimal degree of discussion or explanation, have applied a relaxed causation standard in FELA cases on the authority of *Rogers*. He maintains that Justice Souter's concurring opinion in *Sorrell* should not be employed to undermine *Rogers* and the wealth of authority that relies upon it.

In answering the question posed to us, we must acknowledge, at the very outset, that we hardly write on a clean slate. The question of the proper causation standard under the FELA is one with which the courts have grappled since passage of the Act. We look to these decisions to guide our own inquiry. *See Pearson v. Callahan*, 129 S. Ct. 808, 816-17, 172 L. Ed. 2d 565 (2009) ("We recognize that 'considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation.'" (quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977))).

A. Cases Interpreting Causation in § 1

1. Early FELA cases

Early FELA cases did not interpret the language "resulting in whole or in part" as altering the common-law requirement of proximate cause.[3] For in-

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[3] The term "proximate cause" does not easily lend itself to definition. There is not currently, and was not at the time of the FELA's passage, a uniform or generally accepted definition of

stance, in *St. Louis & San Francisco Railroad Co. v. Conarty*, 238 U.S. 243, 35 S. Ct. 785, 59 L. Ed. 1290 (1915), a widow sought damages for the death of her husband, who was caught in a collision of an engine with another car, from which the coupler and draw-bar were missing. According to the plaintiff, "[h]ad these appliances been in place they, in one view of the evidence, would have kept the engine and the body of the car sufficiently apart to have prevented the injury." *Id.* at 248, 35 S. Ct. 785. There was no question that the absence of the coupler and the

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proximate cause. *See* William H. DeParcq, *A Decade of Progress Under the Federal Employers' Liability Act*, 18 Law & Contemp. Probs. 257, 266-67 (1953) (discussing formulations of proximate cause at common law). Indeed, with respect to the concept of proximate cause, one noted commentator has stated:

> There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion. Nor, despite the manifold attempts which have been made to clarify the subject, is there yet any general agreement to the best approach.

W. Page Keeton, et al., Prosser & Keeton on the Law of Torts § 41 at 263 (5th ed. 1984).

In this case, however, CSX maintains that the correct definition of proximate causation is a "direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992); *see also Eglsaer v. Scandrett*, 151 F. 2d 562, 565-66 (7th Cir. 1945) (observing that the common-law concept of proximate cause meant the "direct, the complete, the responsible, the efficient cause of the injury"); *DeParcq, supra*, at 266-67; *cf. Hemi Group, LLC v. City of New York*, 130 S. Ct. 983, 988-89 (2010) (stating that "[p]roximate cause for RICO purposes ... should be evaluated in light of its common-law foundations" and "requires some direct relation between the injury asserted and the injurious conduct alleged" (internal quotation marks and citations omitted)). Thus, we shall employ CSX's definition for purposes of this opinion.

drawbar constituted a violation of a safety rule and, therefore, negligence. Nevertheless, the Court held that there was not a sufficient nexus between the negligence and the injury to send the case to the jury. In reaching this determination, the Court observed:

> The principal question in the case is whether, at the time he was injured, the deceased was within the class of persons for whose benefit the safety appliance acts required that the car be equipped with automatic couplers and drawbars of standard height; or, putting it in another way, whether his injury was within the evil against which the provision for such appliances are directed. It is not claimed, nor could it be, under the evidence, that the collision was proximately attributable to a violation of those provisions, but only that, had they been complied with, it would not have resulted in injury to the deceased. It therefore is necessary to consider with what purpose couplers and drawbars of the kind indicated are required, for where a duty is imposed for the protection of persons in particular situations or relations a breach of it which happens to result in injury to one in an altogether different situation or relation is not, as to him, actionable.

Id. at 249, 35 S. Ct. 785; see also *Lang v. New York Cent. R.R. Co.*, 255 U.S. 455, 461, 41 S. Ct. 381, 65 L. Ed. 729 (1921) (referencing *Conarty* and noting the difference between proximate cause and "but for" causation). In sum, the Court required that the injury be a direct or proximate result of the violation of

the safety regulation (i.e., the negligent act) in order for liability under the FELA to be imposed.

2. *Rogers* and related cases

These early cases never have been overruled explicitly; however, thirty years later, one commentator observed that "such cases are definitely inconsistent with later decisions and it is safe to say would not be followed today." William H. DeParcq, *A Decade of Progress Under the Federal Employers' Liability Act*, 18 Law & Contemp. Probs. 257, 268 (1953). Specifically, the author referenced, *inter alia*, the Supreme Court's decision in *Coray v. Southern Pacific Co.*, 335 U.S. 520, 69 S. Ct. 275, 93 L. Ed. 208 (1949).

Coray involved an employee who had died as a result of a collision between a freight train and a one-man flat top motorcar. The motorcar was following the train when the train, as a result of a defect in its braking system, stopped suddenly. Although the motorcar was equipped with brakes, both employees on the car were looking backward and did not see that the train in front of them had stopped. The state supreme court affirmed the directed verdict in favor of the defendant on the ground that the violation of the safety rule could not constitute the basis for the company's negligence because its "protection against defective brakes did not extend to employees following and crashing into a train which stopped suddenly because of defective brake appliances." *Id.* at 522, 69 S. Ct. 275. Additionally, the state supreme court held that "the evidence failed to show that the defective appliance was the 'legal' cause of the crash and death of decedent." *Id.* Specifically, the state court "discussed distinctions between 'proximate cause' in the legal sense, deemed a sufficient cause to impose liability, and 'cause' in the 'philosophical sense,' deemed

insufficient to impose liability." *Id.* at 523, 69 S. Ct. 275.

The Supreme Court of the United States, however, rejected this distinction; it stated:

> The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretive purposes. The statute declares that railroads shall be responsible for their employees' deaths "resulting in whole or in part" from defective appliances such as were here maintained. 45 U.S.C. § 51. And to make its purpose crystal clear, Congress has also provided that "no such employee ... shall be held to have been guilty of contributory negligence in any case" where a violation of the Safety Appliance Act, such as the one here, "contributed to the ... death of such employee." 45 U.S.C. § 53.... These air-brakes were defective; for this reason alone the train suddenly and unexpectedly stopped; a motor track car following at about the same rate of speed and operated by an employee looking in another direction crashed into the train; all of these circumstances were inseparably related to one another in time and space. The jury could have found that decedent's death resulted from any or all of the foregoing circumstances.

Id. at 524, 69 S. Ct. 275 (parallel citations omitted); *see also Tiller v. Atl. Coast Line R.R. Co.*, 323 U.S. 574, 578, 65 S. Ct. 421, 89 L. Ed. 465 (1945) (reversing decision of court of appeals, reinstating jury ver-

dict and holding that question whether violation of a safety rule caused the employee's death was one for the jury); *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 33-34, 64 S. Ct. 409, 88 L. Ed. 520 (1944) (same); *cf. Kelley v. S. Pac. Co.*, 419 U.S. 318, 334, 95 S. Ct. 472, 42 L. Ed. 2d 498 (1974) (Douglas, J., dissenting) (observing that, since the 1939 Amendments to FELA, the "Court has interpreted the Act in the spirit of those amendments" and a "[g]radual liberalization has occurred, and the narrow, technical approach of earlier years has been eschewed").

In reviewing some of these same decisions, our own court has concluded that, over the course of the FELA's history, the concept of "proximate cause" had broadened:

> Perhaps the reconciliation of the earlier accepted, sometimes called the old-fashioned idea, of "proximate cause" as the direct or efficient cause of the accident (as would be the district court's illustration of a shock from a defective electric bell ringer causing injuries and death) in cases where this statute applies, and the conception of proximate cause which now obtains, is to be found in the enlarging phrase of the statute. It provides that if the railroad's negligence "*in part*" results in the injuries or death, liability arises. Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has "causal relation," –

> if the injury or death resulted "*in part*" from defendants' negligence, there is liability.
>
> The words "in part" have enlarged the field or scope of proximate causes in these railroad injury cases. These words suggest that there may be a plurality of causes, each of which is sufficient to permit a jury to assess a liability. If a cause may create liability, even though it be but a partial cause, it would seem that such partial cause may be a producer of a later cause. For instance, the cause may be the first acting cause which sets in motion the second cause which was the immediate, the direct cause of the accident.

Eglsaer v. Scandrett, 151 F. 2d 562, 565-66 (7th Cir. 1945). Therefore, although more recent decisions still might have employed language of "proximate cause," that term did not have the same teeth.

According to commentators, this new conception of proximate cause "crystallized" in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957). *See* Charles H. Traeger, III, *Legal Cause, Proximate Cause, and Comparative Negligence in the FELA*, 18 Stan. L. Rev. 929, 932 (1966). In *Rogers*, a railroad laborer was given the job of burning dead vegetation bordering tracks which ran over "a dirt 'dump' with sloping sides" and a "ballast topping." *Rogers*, 352 U.S. at 501, 77 S. Ct. 443. The foreman had instructed the plaintiff and his co-workers "to stop what they were doing when a train passed and to take positions off the tracks and ties to observe the journals of the passing train for hotboxes." *Id.* at 502, 77 S. Ct. 443. The plaintiff was standing a few feet from an adjacent culvert, watch-

ing for hotboxes, "when he became enveloped in smoke and flames" fanned by a passing train. *Id.* The plaintiff covered his face, "retreated quickly back on the culvert and slipped and fell from the top of the culvert, suffering [] serious injuries." *Id.* A jury returned a verdict in favor of the plaintiff, but the Missouri Supreme Court reversed. On writ of certiorari, the Supreme Court held that "the evidence was sufficient to support the jury finding for the petitioner." *Id.* at 503, 77 S. Ct. 443. It noted that the state supreme court had

> based its reversal upon its finding of an alleged admission by the petitioner that he knew it was his primary duty to watch the fire. From that premise the Missouri court reasoned that petitioner was inattentive to the fire and that the emergency which confronted him "was an emergency brought about by himself."

Id. at 503-04, 77 S. Ct. 443 (footnote omitted). The Court then evaluated the state court's rationale:

> We interpret the foregoing to mean that the Missouri court found as a matter of law that the petitioner's conduct was the sole cause of his mishap. But when the petitioner agreed that his primary duty was to watch the fire he did not also say that he was relieved of the duty to stop to watch a passing train for hotboxes. Indeed, no witness testified that the instruction was countermanded. At best, uncertainty as to the fact arises from the petitioner's testimony, and in that circumstance not the court, but the jury, was the tribunal to determine the fact.

> We may assume that the jury could properly have reached the court's conclusion. But, as the probative facts also supported with reason the verdict favorable to the petitioner, the decision was exclusively for the jury to make. The jury was instructed to return a verdict for the respondent if it was found that negligence of the petitioner was the sole cause of his mishap. We must take it that the verdict was obedient to the trial judge's charge and that the jury found that such was not the case but that petitioner's injury resulted at least in part from the respondent's negligence.

Id. at 504-05, 77 S. Ct. 443 (footnotes omitted).

The Supreme Court also believed that the state court opinion could be read as basing its reversal on the ground that "it appeared to the court that the petitioner's conduct was at least as probable a cause for his mishap as any negligence of the respondent, and that in such case there was no case for the jury." *Id.* at 505, 77 S. Ct. 443. The Supreme Court rejected this idea:

> But that would mean that there is no jury question in actions under this statute, although the employee's proofs support with reason a verdict in his favor, unless the judge can say that the jury may exclude the idea that his injury was due to causes with which the defendant was not connected, or, stated another way, unless his proofs are so strong that the jury, on grounds of probability, may exclude a conclusion favorable to the defendant. That is not the governing principle defining the proof which requires a submission

> to the jury in these cases. The Missouri court's opinion implies its view that this is the governing standard by saying that the proofs must show that "the injury would not have occurred but for the negligence" of his employer, and that "[t]he test of whether there is causal connection is that, absent the negligent act the injury would not have occurred." *That is language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury.*
>
> *Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.* It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence.... The statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or in part " to its negligence. (Emphasis added.)

Id. at 505-07, 77 S. Ct. 443 (emphasis added; footnotes omitted).

3. Recent FELA cases

Rogers stopped short of explicitly overruling earlier FELA cases that had spoken in terms of common-law proximate cause. Since *Rogers*, the Supreme Court has not explained in detail how broadly or narrowly *Rogers* should be read by the lower federal courts. Indeed, the Court has discussed *Rogers*

infrequently and, in most cases, without elaboration. In *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326, 78 S. Ct. 758, 2 L. Ed. 2d 799 (1958), for instance, the Court cited *Rogers* for the proposition that the FELA is "an avowed departure from the rules of the common law." *Id.* at 329, 78 S. Ct. 758. However, other cases have attributed to *Rogers* the idea that the FELA incorporates a causation standard less stringent than proximate cause. In *Crane v. Cedar Rapids & Iowa City Railway Co.*, 395 U.S. 164, 89 S. Ct. 1706, 23 L. Ed. 2d 176 (1969), in the course of determining whether the defense of contributory negligence was available to a railroad sued by a nonemployee, the Court observed that a FELA plaintiff "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's violation of the Act." *Id.* at 166, 89 S. Ct. 1706 (quoting 45 U.S.C. § 51 and citing *Rogers*).

More recently, in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994), the Court referenced *Rogers* in addressing the question whether recovery for negligent infliction of emotional distress is available under the FELA. In conducting its analysis of the statutory language and purpose, the Court observed that:

> In order to further FELA's humanitarian purposes, Congress did away with several common-law tort defenses that had effectively barred recovery by injured workers. *Specifically, the statute abolished the fellow servant rule, rejected the doctrine of contributory negligence in favor of that of comparative negligence, and prohibited employers from exempting themselves from FELA through contract;*

a 1939 amendment abolished the assumption of risk defense. See 45 U.S.C. §§ 51, 53-55.

We have liberally construed FELA to further Congress' remedial goal. For example, we held in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957), *that a relaxed standard of causation applies under FELA*. We stated that "[u]nder this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* at 506, 77 S. Ct. 443. In *Kernan [v. American Dredging Co.*, 355 U.S. 426, 78 S. Ct. 394, 2 L. Ed. 2d 382 (1958)], we extended the reach of the principle of negligence *per se* to cover injuries suffered by employees as a result of their employers' statutory violations, even if the injuries sustained were not of a type that the relevant statute sought to prevent. *See id.*, 355 U.S. at 432-436, 78 S. Ct. 394. And in *Urie* [*v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949)], we held that occupational diseases such as silicosis constitute compensable physical injuries under FELA, thereby rejecting the argument that the statute covered only injuries and deaths caused by accidents. *See id.*, 337 U.S. at 181, 69 S. Ct. 1018.

Gottshall, 512 U.S. at 542-43, 114 S. Ct. 2396. Although *Gottshall* characterizes *Rogers* as holding that a relaxed causation standard applies, *Gottshall* also reiterates the importance of common-law prin-

ciples in interpreting the FELA. The Court explained that:

> "[T]he Federal Employers' Liability Act is founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms," [*Urie v. Thompson*, 337 U.S. 163, 182, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949)]. Those qualifications, discussed above, are the modification or abrogation of several common-law defenses to liability, including contributory negligence and assumption of risk. *See* 45 U.S.C. §§ 51, 53-55. Only to the extent of these explicit statutory alterations is FELA "an avowed departure from the rules of the common law." *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 78 S. Ct. 758, 2 L. Ed. 2d 799 (1958). *Thus, although common-law principles are not necessarily dispositive of questions arising under FELA, unless they are expressly rejected in the text of the statute, they are entitled to great weight in our analysis. Cf.* [*Atchison, Topeka & Santa Fe Ry. Co. v.*] *Buell*, 480 U.S. [557, 568, 107 S. Ct. 1410, 94 L. Ed. 2d 563 (1987)]. Because FELA is silent on the issue of negligent infliction of emotional distress, common-law principles must play a significant role in our decision.

Gottshall, 512 U.S. at 543-44, 114 S. Ct. 2396 (emphasis added). Thus, in addition to reaffirming explicitly the common law as an important source in interpreting the Act, the Court stopped short of listing proximate causation among those common-law principles that the FELA had abrogated.

Similarly, our own court never has held, in the wake of Rogers, that the concept of proximate cause has been abandoned in its entirety. Nevertheless, we have employed language that strongly suggests that traditional formulations of proximate cause have no role in FELA cases.[4] For instance, in *Lisek v. Norfolk & Western Railway Co.*, 30 F.3d 823 (7th Cir. 1994), we reviewed whether the district court had erred in entering summary judgment for the employer in a FELA case. We stated:

> The FELA is meant to provide a broad remedial framework for railroad workers and, in light of that purpose, is to be liberally construed in their favor. *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 562, 107 S. Ct. 1410, 94 L. Ed. 2d 563 (1987); *Kulavic v. Chicago & Illinois Midland Ry. Co.*, 1 F.3d 507, 512 (7th Cir. 1993). *Plaintiffs' burden in a FELA action is therefore significantly lighter than it would be in an ordinary negligence case. In a FELA action, the railroad is liable if "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury ...." Harbin v. Burlington N. R.R. Co.*, 921 F. 2d 129, 131 (7th Cir. 1990) (quoting *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957))....

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[4] Indeed, as discussed *supra* at 15-16, our conception of proximate cause in FELA cases began to change even prior to *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957).

Id. at 831-32 (parallel citations omitted; emphasis added). We repeated this language under similar circumstances in *Holbrook v. Norfolk Southern Railway Co.*, 414 F.3d 739 (7th Cir. 2005):

> Because it is meant to offer broad remedial relief to railroad workers, a plaintiff's burden when suing under the FELA is significantly lighter than in an ordinary negligence case. *Lisek v. Norfolk & Western Ry. Co.*, 30 F.3d 823, 832 (7th Cir. 1994); *Harbin v. Burlington Northern R.R.*, 921 F. 2d 129, 131 (7th Cir. 1990). Indeed, a railroad will be held liable where "employer negligence played any part, even the slightest, in producing the injury." *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957).

Holbrook, 414 F.3d at 741-42 (parallel citations omitted).

The idea that *Rogers* relaxed the proximate cause requirement has been echoed by every other court of appeals. *Richards v. Consol. Rail Corp.*, 330 F.3d 428, 433 (6th Cir. 2003) (observing that "the Supreme Court announced a relaxed test for establishing causation in FELA cases in its landmark decision, *Rogers v. Missouri Pacific Railroad Co.*"); *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 436 (4th Cir. 1999) (quoting *Rogers* and noting the "relaxed" standard of causation under FELA); *Nordgren v. Burlington N. R.R. Co.*, 101 F.3d 1246, 1249 (8th Cir. 1996) (citing *Rogers* for the proposition that "the Court has held that relaxed standards apply under FELA ... for causation"); *Mullahon v. Union Pac. R.R.*, 64 F.3d 1358, 1363-64 (9th Cir. 1995) (quoting Rogers and describing a "relaxed" standard

of negligence and causation in FELA cases); *Hines v. Consol. Rail Corp.*, 926 F. 2d 262, 267 (3d Cir. 1991) (distinguishing the case before it from a common-law tort case on the ground that "FELA ... has a more lenient standard for determining negligence and causation"); *Moody v. Maine Cent. R.R. Co.*, 823 F. 2d 693, 695 (1st Cir. 1987) ("We recognize the considerably relaxed standard of proof in FELA cases.");[5]

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[5] In its reply, CSX acknowledges that five circuits "have either held or stated that a FELA plaintiff need not prove proximate cause," but also states that, "[a]t the same time, at least one circuit ... ha[s] reached the opposite conclusion." Reply Br. 14-15. For this latter proposition, CSX cites *Boston & Maine Railroad v. Talbert*, 360 F. 2d 286, 288 (1st Cir. 1966), and specifically quotes the following language from that case: "[T]he plaintiff has the burden of proving negligence and proximate cause." Placed in context, however, the First Circuit's statement is completely consistent with its later pronouncement that there is a relaxed standard of proof in FELA cases. In *Talbert*, the First Circuit stated:

> Under the statute upon which liability is predicated here plaintiff must show that the injury and death of this employee resulted in whole or in part from the negligence of the defendant railroad. In *New York, New Haven and Hartford Railroad Co. v. Dox*, 249 F. 2d 572 (1st Cir. 1957), we held that the plaintiff has the burden of proving negligence and proximate cause. *However, in reviewing the jury's verdict on the question of liability we must be guided by the principles laid down in Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957), a Federal Employer's Liability Act case, in which the Supreme Court said:
>
> > "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, in-

Brooks v. Washington Terminal Co., 593 F. 2d 1285, 1288 (D.C. Cir. 1979) (noting the "liberality" of the FELA causation standard).[6]

Some courts of appeals have been more explicit and have stated that the FELA modified or abandoned common-law proximate cause. *See Nicholson v. Erie R.R. Co.*, 253 F. 2d 939, 940 (2d Cir. 1958) (quoting *Rogers* and stating that "[i]t is true that, to impose liability on the defendant, the negligence need not be the proximate cause of the injury" because the FELA "has its own rule of causation"); *Nivens v. St. Louis Sw. Ry. Co.*, 425 F. 2d 114, 118 (5th Cir. 1970) (quoting Rogers and holding that "the common-law proximate cause standard is modified, and the employee has a less demanding burden of proving causal relationship"); *Summers v. Missouri Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997) ("During the first half of this century, it was customary for courts to analyze liability under the FELA in terms of proximate causation. However, the Su-

> cluding the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death."

Talbert, 360 F. 2d at 288 (footnote and parallel citations omitted; emphasis added).

[6] Also in its reply, CSX argues that many of these cases simply recite "the general proposition that FELA employs a 'relaxed standard' of causation, without discussing (or even mentioning) proximate cause." Reply Br. 19. We do not believe that the fact that some of these cases fail directly to juxtapose common-law proximate causation with FELA causation reduces their worth. The use of the term "relaxed standard" necessarily suggests the existence of a more stringent standard from which the courts departed.

preme Court definitively abandoned this approach in [*Rogers*]." (internal citations omitted)).

4. *Sorrell*

As we noted earlier, CSX maintains that, regardless of courts' interpretation of *Rogers* up to this point, the Supreme Court's decision in *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158, 127 S. Ct. 799, 166 L. Ed. 2d 638 (2007), and specifically Justice Souter's concurrence in that decision, makes it clear that the holding of *Rogers* is much narrower than courts have perceived. We turn, therefore, to an examination of that case in our search for guidance.

Sorrell, an employee of Norfolk Southern, was driving a dump truck loaded with asphalt when, somehow, Sorrell's truck veered off the road and tipped over. Sorrell, who sustained injuries as a result of the accident, maintained that another Norfolk truck had approached and forced him off the road; the other Norfolk driver, however, maintained that Sorrell simply had driven his truck off the road. Sorrell filed an action in Missouri state court under the FELA. In that action, Sorrell alleged that Norfolk had failed to provide him with a reasonably safe place to work; Norfolk countered that Sorrell's own negligence caused the accident.

At trial, Sorrell proposed an instruction that required Norfolk Southern to establish that his negligence "'directly contributed to cause' the injury, while allowing a finding of railroad negligence if the railroad was negligent and its negligence contributed 'in whole or in part' to the injury." *Sorrell*, 549 U.S. at 161, 127 S. Ct. 799, 166 L. Ed. 2d 638 (quoting Mo. Approved Jury Instr., Civ., No. 32.07(B) & No. 24.01, respectively). Norfolk Southern objected to the instruction "on the ground that it provided a 'different'

and 'much more exacting' standard for causation than that applicable with respect to the railroad's negligence under the Missouri instructions.' " *Id.* The trial court overruled the objection, a jury returned a verdict in Sorrell's favor, and Norfolk Southern was unsuccessful in obtaining post-trial relief from the state courts.

Norfolk Southern then filed a petition for certiorari that raised the following question: "[W]hether the Missouri courts erred in determining that the causation standard for employee *contributory negligence* under [FELA] differs from the causation standard for railroad *negligence*." *Id.* at 162, 127 S. Ct. 799 (internal citations and quotation marks omitted; emphasis and alteration in original). However, in its briefing before the Court, Norfolk

> attempted to expand the question presented to encompass what the standard of causation under FELA should be, not simply whether the standard should be the same for railroad negligence and employee contributory negligence. In particular, Norfolk contends that the proximate cause standard reflected in the Missouri instruction for employee contributory negligence should apply to the railroad's negligence as well.

Id. at 163, 127 S. Ct. 799. Sorrell raised both substantive and procedural objections to Norfolk Southern's efforts. Sorrell first argued that the Court had settled the issue of the proper standard of causation in *Rogers*. Procedurally, Sorrell maintained, the Court had granted certiorari only to determine whether the FELA incorporated different standards of negligence for employee and railroad liability. As well, continued Sorrell, Norfolk's position was con-

trary to that which it had taken in the Missouri courts, where it had argued that the more lenient standard articulated in *Rogers* should be applied both to railroads and to employees.

The Court declined the invitation to enlarge the question before it; it explained:

> We agree with Sorrell that we should stick to the question on which certiorari was sought and granted. We are typically reluctant to permit parties to smuggle additional questions into a case before us after the grant of certiorari. Although Norfolk is doubtless correct that we could consider the question of what standard applies as anterior to the question whether the standards may differ, the issue of the substantive content of the causation standard is significant enough that we prefer not to address it when it has not been fully presented. We also agree with Sorrell that it would be unfair at this point to allow Norfolk to switch gears and seek a ruling from us that the standard should be proximate cause across the board.
>
> What Norfolk *did* argue throughout is that the instructions, when given together, impermissibly created different standards of causation. It chose to present in its petition for certiorari the more limited question whether the courts below erred in applying standards that differ. That is the question on which we granted certiorari and the one we decide today.

Id. at 164-65, 127 S. Ct. 799 (citations omitted). The Court then turned to the substantive question properly before it.

In resolving the question whether different standards of negligence apply to the employee and the railroad under the FELA, the Court observed that, "[a]bsent express language to the contrary, the elements of a FELA claim are determined by reference to the common law." *Id.* at 165-66, 127 S. Ct. 799. Thus, it was "strong evidence" against Missouri's disparate standards that the common law employed the same standard for negligence and contributory negligence. *Id.* at 168, 127 S. Ct. 799. Sorrell argued, however, that the FELA did contain an explicit statutory alteration from the common-law standard for negligence; specifically, the Act provides that the railroad is liable if its negligence contributed in whole or in part to the employee's injuries. The Court disagreed that this language suggested that it should depart from the common-law rule of applying the same standard of negligence for both the employee and the railroad:

> The inclusion of this language in one section and not the other does not alone justify a departure from the common-law practice of applying a single standard of causation. It would have made little sense to include the "in whole or in part" language in Section 3, because if the employee's contributory negligence contributed "in whole" to his injury, there would be no recovery against the railroad in the first place. The language made sense in Section 1, however, to make clear that there could be recovery against the railroad even if it were only partially negligent.

> Even if the language in Section 1 is understood to address the standard of causation, and not simply to reflect the fact that contributory negligence is no longer a complete bar to recovery, there is no reason to read the statute as a whole to encompass different causation standards. Section 3 simply does not address causation. On the question whether a different standard of causation applies as between the two parties, the statutory text is silent.

Id. at 170-71, 127 S. Ct. 799. The Court thus concluded that the "FELA does not abrogate the common-law approach, and that the same standard of causation applies to railroad negligence under Section 1 as to plaintiff contributory negligence under Section 3." *Id.* at 171, 127 S. Ct. 799.

Justice Souter, joined by Justices Scalia and Alito, filed a separate concurring opinion. Justice Souter believed that the briefs adequately had addressed the issue of the proper standard of causation under the FELA and, therefore, thought it "fair to say a word about the holding in *Rogers*." *Id.* at 173, 127 S. Ct. 799 (Souter, J., concurring). The Justice continued that, "[d]espite some courts' views to the contrary, *Rogers* did not address, much less alter, existing law governing the degree of causation necessary for redressing negligence as the cause of negligently inflicted harm; the case merely instructed courts how to proceed when there are multiple cognizable causes of an injury." *Id.* (footnote omitted). Justice Souter explained that, although Congress abrogated several common-law rules in the FELA, the "FELA said nothing, however, about the familiar proximate cause standard for claims either of a defendant-

employer's negligence or a plaintiff-employee's contributory negligence." *Id.* at 174, 127 S. Ct. 799. Turning then, specifically, to *Rogers*, Justice Souter wrote:

> *Rogers* left this law where it was. We granted certiorari in *Rogers* to establish the test for submitting a case to a jury when the evidence would permit a finding that an injury had multiple causes. 352 U.S. at 501, 506, 77 S. Ct. 443. We rejected Missouri's "language of proximate causation which ma[de] a jury question [about a defendant's liability] dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury." *Id.* at 506, 77 S. Ct. 443. The notion that proximate cause must be exclusive proximate cause undermined Congress's chosen scheme of comparative negligence by effectively reviving the old rule of contributory negligence as barring any relief, and we held that a FELA plaintiff may recover even when the defendant's action was a partial cause of injury but not the sole one. Recovery under the statute is possible, we said, even when an employer's contribution to injury was slight in relation to all other legally cognizable causes.

Id. at 174-75, 127 S. Ct. 799. Justice Souter did acknowledge that "clarity was not well served by the statement in *Rogers* that a case must go to a jury where 'the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury of death for which damages are sought.'" *Id.* at 175, 127 S. Ct. 799 (quoting Rogers, 352 U.S. at 506, 77 S. Ct. 443). Nev-

ertheless, he believed that the passage "spoke to apportioning liability among the parties, each of whom was understood to have had some hand in causing damage directly enough to be what the law traditionally called a proximate cause." *Id.*

Justice Ginsburg, concurring in the judgment, also wrote separately. Relying on many of the authorities that Mr. McBride has relied upon in the present case, Justice Ginsburg stated that the question of the proper standard of causation under the FELA "is long settled, we have no cause to reexamine it." *Id.* at 177 (Ginsburg, J., concurring in the judgment). She explained her rationale accordingly:

> In *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532, 543, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994), we acknowledged that "a relaxed standard of causation applies under FELA." Decades earlier, in *Crane v. Cedar Rapids & Iowa City R. Co.*, 395 U.S. 164, 89 S. Ct. 1706, 23 L. Ed. 2d 176 (1969), we said that a FELA plaintiff need prove "only that his injury resulted in whole or in part from the railroad's violation." *Id.*, at 166, 89 S. Ct. 1706 (internal quotation marks omitted). Both decisions referred to the Court's oft-cited opinion in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957), which declared: "Under [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.*, at 506, 77 S. Ct. 443 (emphasis added). *Rogers*, in turn, drew upon *Coray v.*

Southern Pacific Co., 335 U.S. 520, 524, 69 S. Ct. 275, 93 L. Ed. 208 (1949), in which the Court observed: "Congress ... imposed extraordinary safety obligations upon railroads and has commanded that if a breach of these obligations contributes in part to an employee's death, the railroad must pay damages."

These decisions answer the question Norfolk sought to "smuggle ... into" this case, ... *i.e.*, what is the proper standard of causation for railroad negligence under FELA. Today's opinion leaves in place precedent solidly establishing that the causation standard in FELA actions is more "relaxed" than in tort litigation generally.

A few further points bear emphasis. First, it is sometimes said that *Rogers* eliminated proximate cause in FELA actions.... It would be more accurate, as I see it, to recognize that *Rogers* describes the test for proximate causation applicable in FELA suits. That test is whether "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S. at 506, 77 S. Ct. 443.

....

FELA was prompted by concerns about the welfare of railroad workers.... "We have liberally construed FELA to further Congress' remedial goal." *Gottshall*, 512 U.S. at 543, 114 S. Ct. 2396. With the motivation for FELA center stage in *Rogers*, we held that a FELA plaintiff can get to a jury if he

> can show that his employer's negligence was even the slightest cause of his injury.

Id. at 177-78 (citations omitted). Thus, at least in Justice Ginsburg's view, the Court left intact a relaxed standard for causation under the FELA on the authority of *Rogers* as well as the Court's subsequent FELA case law.

B. Application of FELA cases

As noted above, CSX urges us to follow the rationale set forth in Justice Souter's concurring opinion. Justice Souter, CSX argues, persuasively demonstrates how the courts of appeals have gone awry in interpreting *Rogers*. CSX urges us to accept Justice Souter's critique and to realign our own case law with that of the Supreme Court. In righting our course, CSX notes, we would not be alone. Most recently, the Supreme Court of Utah, prompted by the Court's decision in *Sorrell*, has read *Rogers* in a more guarded way and held that common-law proximate cause is the correct standard of causation under the FELA. *See Raab v. Utah Ry. Co.*, 221 P.3d 219 (Utah 2009).[7]

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[7] Although CSX lists six state courts of last resort which, it claims, adhere to the requirement of proximate cause in FELA cases, upon closer examination, it is clear that several states to which CSX refers do not require FELA plaintiffs to establish "proximate cause," that is a "direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992); *see supra* note 3. For instance, in *Snipes v. Chicago, Central & Pacific Railroad Co.*, 484 N.W.2d 162, 164-65 (Iowa 1992), the court states that "[r]ecovery under the FELA requires an injured employee to prove that the defendant employer was negligent and that the negligence proximately caused, in whole or in part, the accident"; however, it then goes

Justice Souter's critique of the existing case law is not without considerable force. Section 1 of the FELA could be read only as abrogating the common-law rule of contributory negligence and not as articulating a general standard for negligence. Even after *Rogers*, the Supreme Court has instructed that, for purposes of the FELA, unless common-law principles "are expressly rejected in the text of the statute, they are entitled to great weight." *Gottshall*, 512 U.S. at 544, 114 S. Ct. 2396; *see also Sorrell*, 549 U.S. at 165-66, 127 S. Ct. 799 ("Absent express language to the contrary, the elements of a FELA claim are determined by reference to the common law."). Proximate causation is not explicitly mentioned in the statute, and the Court never has identified proximate causation as among those principles of common law that have been abrogated by the FELA. *Gottshall*, 512 U.S. at 543-44, 114 S. Ct. 2396. Furthermore, Justice Souter's reading of *Rogers* is a plausible one. As Justice Souter correctly explains in his concurrence, *Rogers* itself was a case that involved multiple caus-

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on to quote the standard from *Rogers* and observes that this is a "low threshold for recovery." Additionally, in three states named by CSX, Minnesota, Ohio and Nebraska, later appellate court cases, relying on *Rogers*, hold that FELA claims are subject to a less stringent causation requirement than common-law claims. *See, e.g., Hager v. Norfolk & W. Ry. Co.*, No. 87553, 2006 WL 3634373, at *5 (Ohio App. Dec. 14, 2006); *Crafton v. Union Pac. R. Co.*, 7 Neb.App. 793, 585 N.W.2d 115, 123 (1998) ("The quantum of evidence required to establish liability in a FELA action is lower than that required in an ordinary negligence action. The common-law standard of proximate cause is not applicable to FELA." (citations omitted)); *Narusiewicz v. Burlington N.R. Co.*, 391 N.W.2d 895, 898-99 (Minn. App. 1986). At most, therefore, Utah, Montana and West Virginia still apply traditional formulations of proximate cause in FELA cases.

es, and much of *Rogers* speaks directly to the issue of when a case with multiple causes must be submitted to a jury. *See Rogers*, 352 U.S. at 504-05, 77 S. Ct. 443; *Sorrell*, 549 U.S. at 174-75, 127 S. Ct. 799 (Souter, J., concurring) ("We granted certiorari in *Rogers* to establish the test for submitting a case to a jury when the evidence would permit a finding that an injury had multiple causes.").

Nevertheless, there are several important countervailing considerations that preclude us from embracing Justice Souter's view at this juncture. First, we must recognize that, in *Sorrell*, the Supreme Court did not address, much less decide, the issue that CSX would have us decide today in this case. Justice Souter's concurrence garnered the votes of only two other members of the Court. The majority of the Court believed that causation in general was not properly raised. Although there is some indication that, had it reached the substantive issue, at least some members of the majority may have been sympathetic to Justice Souter's view, *see Sorrell*, 549 U.S. at 170-71, 127 S. Ct. 799 (suggesting that Section 1 could be understood as "simply ... reflect[ing] the fact that contributory negligence is no longer a complete bar to recovery"), we have been admonished not to anticipate future actions of the Supreme Court. *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997) ("The Court of Appeals was correct in applying that principle [of stare decisis] despite disagreement with *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents."); *Nanda v. Bd. of Trs. of the Univ. of Ill.*, 312 F.3d 852, 854 (7th Cir. 2002) (Ripple, J., in chambers) ("In deciding a case, a circuit judge must not anticipate future changes in jurisprudential course by the Supreme Court of the United States; it

is the task of a circuit judge to apply established doctrine.").

A related consideration is that we must treat with great respect the prior pronouncements of the Supreme Court, even if those pronouncements are technically dicta. *See Nichol v. Pullman Standard, Inc.*, 889 F. 2d 115, 120 n.8 (7th Cir. 1989). As noted above, Justice Souter "stipulate[d] that clarity was not well served by the statement in *Rogers* that a case must go to a jury where 'the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.' " *Sorrell*, 549 U.S. at 175, 127 S. Ct. 799, 166 L. Ed. 2d 638. Justice Souter believed that this language "spoke to apportioning liability among parties," each of whom had proximately caused the damage. *Id.* With great respect to Justice Souter's explanation, we are not free to ignore the subsequent statements by the Supreme Court that suggest a much broader reading of this language. Indeed, in *Gottshall*, the Court stated: "We have liberally construed FELA to further Congress' remedial goal. For example, we held in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957), that a relaxed standard of causation applies under FELA." 512 U.S. at 543, 114 S. Ct. 2396. We also cannot discount pre- Rogers case law that is consistent with a broader reading of the quoted language in *Rogers*. *See Coray*, 335 U.S. at 524, 69 S. Ct. 275 ("The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose. The statute declares that railroads shall be responsible for their employees' deaths 'resulting in whole or in part'

from defective appliances such as were here maintained."); *see also Crane*, 395 U.S. at 166, 89 S. Ct. 1706 (stating that a FELA plaintiff "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's violation of the Act").

Additionally, before creating a division of authority among the circuits, we take respectful note that our current interpretation of *Rogers* is in accord with the interpretation adopted by all of our sister circuits. All have taken the view, based on *Rogers*, that there is a "relaxed" standard of probable cause under the FELA.[8] Adopting Justice Souter's interpretation of Rogers, therefore, would not only run contrary to our own case law, but would cause a conflict with every other court of appeals, a step that we do not take lightly. *See Russ v. Watts*, 414 F.3d 783, 788 (7th Cir. 2005) (invoking "the interest in avoiding unnecessary intercircuit conflicts" as a "compelling" reason for reevaluating our own precedent (internal quotation marks and citations omitted)); *United States v. Gwaltney*, 790 F. 2d 1378, 1388 n.4 (9th Cir. 1986) ("Unnecessary conflicts among the circuits are to be avoided."); *United States v. Scaife*, 749 F. 2d 338, 344 (6th Cir. 1984) (agreeing that "intercircuit conflicts are to be avoided if possible").

Finally, because we deal, at bottom, with a statute enacted by Congress, we must give respectful attention to the Legislative Branch's reaction to the Supreme Court's treatment of the FELA. Congressional inaction, in the wake of *Rogers* and circuit law broadly interpreting *Rogers*, counsels against adopt-

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[8] As we have discussed previously, we disagree with CSX that the First Circuit has taken the contrary view. *See supra* note 5.

ing a common-law formulation of probable cause in FELA cases. As we noted in a prior FELA case:

> We will not assume that Congress is unaware of the judicial gloss that the Act has received. If the Act as it has been interpreted and applied does not correctly reflect what was intended by the legislative branch then the change must be made there. The duty of this court is to follow what is now well-established authority.

Heater v. Chesapeake & Ohio Ry. Co., 497 F. 2d 1243, 1246 (7th Cir. 1974). Congress, faced with the Supreme Court's articulation of the governing standards in FELA cases and the consistent interpretation of that articulation by courts of appeals, has not seen fit to amend the FELA to clarify or correct the standard of causation that has been applied almost universally.

In light of these considerations, we decline to hold that, in light of the Supreme Court's opinion in *Sorrell*, common-law proximate causation is required to establish liability under the FELA. Having reached this conclusion, we cannot say that the district court committed instructional error in refusing CSX's proffered instruction. Similarly, we find no error in the causation instruction given to the jury. The instruction stated: "Defendant 'caused or contributed to' plaintiff's injury if defendant's negligence played a part-no matter how small-in bringing about the injury." R.43 at 13. This language simply paraphrases the Supreme Court's own words in *Rogers* and, therefore, correctly states the law as the Supreme Court has articulated it up to now. *See Rogers*, 352 U.S. at 506, 77 S. Ct. 443 (requiring that a case be submitted to the jury when "the proofs justify with reason the

conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought").[8]

Conclusion

Because the jury instructions "correctly and completely informed the jury of the applicable law," *Huff v. Sheahan*, 493 F.3d 893, 899 (7th Cir. 2007), the judgment of the district court is affirmed.

AFFIRMED

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[8] Because we conclude there was no instructional error, we do not reach the difficult question whether any error was prejudicial.

APPENDIX B

United States District Court,
S.D. Illinois.

Robert McBRIDE, Plaintiff,
v.
CSX TRANSPORTATION INC., Defendant.
No. 06-cv-1017-JPG.

Sept. 8, 2008.

Michael K. Nowak, Robert P. Marcus, Kujawski & Nowak, P.C., O'Fallon, IL, for Plaintiff.

James A. Bax, Brasher Law Firm, St. Louis, MO, for Defendant.

MEMORANDUM AND ORDER

J. PHIL GILBERT, District Judge.

This matter comes before the Court on Defendant's Motion for Reversal or in the Alternative, New Trial, or in the Alternative, Remittitur (Doc. 51). Also before the Court is Plaintiff's Motion for Costs (Doc. 49) to which Defendant has objected and Plaintiff has responded.

BACKGROUND

This Federal Employers' Liability Act (FELA) case was tried to a jury August 18 and 19, 2008. The jury returned a verdict in favor of Plaintiff. The jury determined that Plaintiff's damages were $275,000 (two hundred and seventy-five thousand dollars). The jury further determined that Plaintiffs contributory negligence was responsible for 33% of Plaintiffs damages. The Court decreased Plaintiff's total award accordingly.

ANALYSIS

Defendant first contends that the Court erred when it refused to instruct the jury on the issue of proximate cause in a FELA case. For the reasons given by the Court in the jury instruction conference, the Court rejects this contention.

Defendant next contends that the Court erred when it denied Defendant's Motion for a Directed Verdict. The relevant inquiry for the Court is "whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in the light most favorable to the party against whom the motion is directed." *Emmel* v. *Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 629 (7th Cir. 1996). Here, Plaintiff put forth sufficient evidence from which a jury could conclude that Defendant was negligent and that such negligence caused Plaintiff's injuries. As a result, Defendant is not entitled to a directed verdict.

Finally, Defendant contends that the jury award to Plaintiff was excessive. Because there was a rational connection between the evidence on damages and the verdict, the Court will not disturb the jury's award. *Frazier* v. *Norfolk & Western Ry. Co.*, 996 F. 2d 922, 925 (7th Cir. 1993)

Finally, Defendant objects to the Plaintiffs bill of costs insofar as Plaintiff seeks three hundred dollars in costs for videography of the deposition of Paul Perry, M.D., which was played in Plaintiff's case in chief. The videography of depositions may properly be taxed as costs. *See Little* v. *Mitsubishi Motors North America, Inc.*, 514 F.3d 699, 701 (7th Cir. 2007). Defendant concedes the propriety of the other

costs to which Plaintiff contends he is entitled. Therefore, the Court will award the amount prayed for in Plaintiffs Motion.

CONCLUSION

The Court **DENIES** Defendant's Motion (Doc. 51) and **GRANTS** Plaintiffs Motion (Doc. 49). The Court awards Plaintiff costs in the amount of $1,265.97 (one thousand two hundred sixty five dollars and ninety-seven cents).

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBERT MCBRIDE,
Plaintiff,

v.

CSX TRANSPORTATION INC.,
Defendant.

Case No. 06-CV-1017-JPG

JUDGMENT

This matter having been tried before a jury, and the jury having rendered a verdict finding liability on the part of Defendant CSX Transportation Inc., and assessing damages to Plaintiff Robert McBride in the amount of $275,000.00 (two hundred and seventy-five thousand dollars), and further assessing Plaintiffs percentage of contributory negligence at 33% (thirty- three percent) and Defendant's percentage of contributory negligence at 67% (sixty-seven percent), **IT IS HEREBY ORDERED AND ADJUDGED** that judgment is entered in favor of Plaintiff Robert McBride for the sum of **$184,250.00 (one hundred and eighty-four thousand two hundred and fifty dollars) plus costs**, and against Defendant CSX Transportation Inc.

DATED: August 21, 2008 NORBERT JAWORSKI

By: s/Deborah Agans,
Deputy Clerk

Approved: s/ J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE

APPENDIX D

Special Verdict Form A

1. Do you find that Defendant was negligent and that Defendant's negligence caused or contributed to Plaintiffs injuries?

ANSWER Yes (Yes or No)

If you **answer "no" to Question 1, do not answer any more questions.**

2. Without taking into consideration any possible negligence by Plaintiff, what sum of money do you find to be the total amount of Plaintiffs damages?

ANSWER $275,000

3. Do you find that Plaintiff was negligent and that Plaintiffs negligence caused or contributed to his own injuries?

ANSWER Yes (Yes or No)

Answer Question 4 only if you answered "Yes" to Question 3.

4. What percentage of Plaintiffs damages do you find to have been caused by the negligence of the respective parties?

(Answer in terms of percentages totaling 100%):
Plaintiff 33%
Defendant 67%

Date: August 19, 2008

/s/ Kevin Vaughn
/s/ Jeff Jones
/s/ Larry Eagleson
/s/ John J. Keehn
/s/ Elaine Thackrey

/s/ [illegible] Hartke
/s/ [illegible] Glover

APPENDIX E

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
June 3, 2010
Before
KENNETH F. RIPPLE, *Circuit Judge*
ILANA D. ROVNER, *Circuit Judge*
DIANE S. SYKES, *Circuit Judge*
No. 08-3557
ROBERT McBRIDE,
Plaintiff-Appellee,
v.
CSX TRANSPORTATION, INC.,
Defendant-Appellant.
Appeal from the United States District Court for the Southern District of Illinois.
No. 3:06-cv-01017-JPG-CJP
J. Phil Gilbert, *Judge*.

ORDER

Upon consideration of appellant's petition for rehearing en banc, filed on March 29, 2010, and the answer of appellees, filed on May 13, 2010, no judge in active service has requested a vote thereon and the judges on the original panel have voted to deny the petition.* Accordingly,

IT IS ORDERED that the petition for rehearing en banc is hereby DENIED.

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* Judge Flaum took no part in the consideration or decision of the petition for rehearing en banc.

APPENDIX F

The Federal Employer's Liability Act, 45 U.S.C. §§ 51-60, provides as follows:

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by

such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

§ 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

§ 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held

to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

§ 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

§ 57. Who included in term "common carrier"

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

§ 58. Duty or liability of common carriers and rights of employees under other acts not impaired

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

§ 59. Survival of right of action of person injured

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if

none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

§ 60. Penalty for suppression of voluntary information incident to accidents; separability

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided*, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby.

APPENDIX G

[1] UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBERT McBRIDE,

Plaintiff,

vs.

CSX TRANSPORTATION, INC.,

Defendant.

Docket No. 06-CV-01017-JPG-CJP
Benton, Illinois

August 18, 2008

VOLUME 1
Trial Proceedings
BEFORE THE HONORABLE J. PHIL GILBERT
UNITED STATES DISTRICT COURT JUDGE, and a jury.

APPEARANCES:

For the Plaintiff:
Mr. Robert P. Marcus
Mr. Michael K. Nowak
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Court Reporter:
Jane McCorkle
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Benton, Illinois 62812
618-439-7725
janemccorkle@verizon.net

[50] * * * *

MR. MARCUS: Expert witness, Paul Byrnes.

PAUL F. BYRNES, having been duly sworn, testified as follows:

THE CLERK: Would you be seated, please. State your full name for the record and spell your last name.

THE WITNESS: Paul F. Byrnes, B-Y-R-N-E-S.

DIRECT EXAMINATION

BY MR. MARCUS:

* * * *

[61] * * * *

Q. Okay. And based on your review of the materials that you were provided, what's your understanding of Bob McBride's use of the independent brake on April 12th, 2004?

A. My understanding is that Mr. McBride was assigned to do switching with large drafts or cuts of cars. Now because of the weight of the locomotives, he had approximately 2,000,000 pounds of locomotives on the head end that he was operating from. Because of the limitations of the draft gear, which actually keeps the cars coupled up together, he had to be [62] extremely careful in how he used that independent or locomotive brake or it would have the effect of just snapping those knuckles like they were made of plastic.

So much of the movements that he had to do that day, based on my understanding, he had to actually use what's known as the automatic or the train brakes to slow and stop the switching movements.

And at the same time, pursuant to CSX operating and air brakes and train handling rules, he had to insure that the locomotive brakes, what's known as bailed off — here again, without trying to get too complicated.

Whenever the engineer sets the train brakes, by design the locomotive brakes will also set up unless you do what's called bailing them off. Now one of the reasons, one of the reasons that CSX and all other general system railroads require that you bail off the locomotive brakes is because, otherwise, you can end up with flat spots on the wheels or you could overheat the wheels.

Because of the enormous amount of weight he had on the rear end, he had to insure that the locomotives did not act like an anchor and allow the cars to snap out and snap knuckles.

* * * *

[65] * * * *

Q. And do you have an opinion as you sit here today, based on your experience that we previously talked about, do you have an opinion whether the train that the defendant CSX set up for Bob McBride, that is, the wide body locomotives in the front and five locomotives total, do you have an opinion whether that was unsafe to be used for switching all day?

A. I do because the combination of the extreme weight in the locomotive consist, the size of the cuts of cars he was switching, the fact he had to use the automatic brake valve, combined with the design of the independent brake and the fact that he had to hold that button in for 20 seconds each time he used

the automatic brake valve, to me, in combination, it all served to create an unsafe situation, yes.

Q. You talked about the size and you may have already addressed this, but tell the jury what the problems of the size of the engines and locomotives are.

A. These AC locomotives are, to be more correct, these General Electric AC 4400 CWs, are approximately 75 feet long. They probably weigh in the neighborhood of 410,000 pounds apiece. The design of the General Electric locomotive, the radiators extend horizontally out to the sides almost like [66] bat wings.

The effect of that is that it diminishes greatly your visibility to the rear. The length of the locomotive, it creates blind spots. It adds extra pressure, if you will, on the locomotive engineer to be extremely careful when negotiating tight curves, tight radius curves, because of the long wheel base and high axle loadings.

And in addition, General Electric locomotives historically have been very slow to load. Loading is a term that engineers refer to an engine locomotive revving up and generating power. The closest analogy would be like if you had a car that was very slow to rev up.

So normally you want fast, nimble locomotives for switching because you're setting cars out, you're picking up cars, you're spotting cars. A lot of back and forth. Stop. That will do. Come ahead and go back. The more time it takes you to stop and to rev that locomotive up and generate power to the rail, the more time you're spending and the less work that's getting done.

Q. Are these locomotives, these wide body 4400 ACs, are they good switching locomotives?

A. I have actually ran an AC 4400. I have operated literally thousands of General Electric locomotives, and I certainly would not want to have to switch with the General Electric locomotives that I used. In addition, I don't like [67] that type of cab. I have actually switched with a comparable cab. When I was at the transportation test center in Pueblo, Colorado, I found it to be extremely unwieldy as a switch engine for switching purposes.

* * * *

[70] * * * *

CROSS EXAMINATION

BY MR. BAX:

* * * *

[72] * * * *

Q. Okay. So if you were making a smaller move, 5, 10, 15 cars, it would not be necessary for him to use the train brakes, and it would not be necessary for him to actuate the air off the independent brake; isn't that correct?

A. No, that is not correct because, for example, now you're ratcheting up to 15 cars at this point. Let's go with that. If you have 15 loads and you are moving 7, 8, 9, 10 miles an hour and then you are told that will do, if you slap on that independent, if you go to fully applied locomotive brakes, you have 2,000,000 pounds of locomotives which you want to stop right now, and those cars are just going to slingshot out, and you have a very good chance of break-

ing knuckles and even possibly putting something on the ground.

* * * *

APPENDIX H

[83] UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
ROBERT McBRIDE,
Docket No. 06-CV-01017-JPG-CJP
Plaintiff,
Benton, Illinois
August 19, 2008
vs.
CSX TRANSPORTATION, INC.,
Defendant.
VOLUME 2
Trial Proceedings
BEFORE THE HONORABLE J. PHIL GILBERT
UNITED STATES DISTRICT COURT JUDGE, and a jury.

APPEARANCES:

For the Plaintiff: Mr. Robert P. Marcus
Mr. Michael K. Nowak
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1331 Park Plaza Drive, Suite 2
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For the Defendant: Mr. James A. Bax
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Court Reporter: Jane McCorkle
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Benton, Illinois 62812
618-439-7725
janemccorkle@verizon.net

[86] * * * *

MR. MARCUS: Thank you, Your Honor. Plaintiffs call Bob McBride.

ROBERT K. McBRIDE,

having been duly sworn, testified as follows:

THE CLERK: Would you be seated, please. State your full name for the record and spell your last name.

THE WITNESS: Robert K. McBride, M-C-B-R-I-D-E.

DIRECT EXAMINATION

BY MR. MARCUS:

* * * *

[90] * * * *

Q. Did you eventually see your train that day?

A. Yes, as we was walking out to our train, I saw there was two wide bodies front. They're back to back. One's facing [91] west and the other is facing east. There was three conventional cabs behind them.

Q. Did that concern you?

A. Yes. Because I've never switched with a wide body cab before. They're not used for switching. From Evansville to Nashville, they are used for coal trains and grain trains. So I was never trained to use one for switching. They are not used for that.

Q. Did you ever perform switching before?

A. Yes, I have.

Q. And on what type of engines?

A. A conventional cab engine.

* * * *

[94] * * * *

Q. Where did you go after Belnap sighting?

A. I went to Lamont, I believe Lamont sighting. The only day I worked there. I believe it was Lamont sighting and done switching at Lamont.

Q. How long did you do switching at Lamont?

A. Hour and a half, two hours constant switching. Because when you switch cars, you have a conductor at the switch and you have a brakeman back between the two tracks. The conductor pulls you forward. He lines the switch. You have to shove back. The brakeman calls for three step. That's [95] where you have to set all your brakes, set the reverser. He closes the angle cock, pulls the pin, you take off. Reaches the three step, you take off.

And while you're taking off, trying to get that above the switch, the conductor is lining the switch after you get by it, and the brakeman, he's lacing up the air hose. Ready to go. So when you come back, he walks to the next track, and he does the same thing. Takes 15, 20 seconds to cut a car at the most, maybe.

Q. When you were at Lamont sighting, were you operating the wide body cab that day?

A. Yes, I was.

Q. Were you doing consistent and constant —

A. Consistent back and forth. At the time we had a hose in cars. If you don't put air on the cars, they come in and hit the engines. At the time we had five engines. You don't switch five engines. You've got too

much weight. So the cars, you don't want them to come in and hit the engines and maybe jackknife them off the track.

So you put air on the cars. You keep engine brakes released. So you kind of are using the cars as your brakes so you don't burn up the brakes on your engines. But you have to feather back and forth the independent and push on the button. At the whole time you are grabbing it.

Well, you're going from, you have the reverser, [96] your throttle, your automatic, and the independent. So you are using your left hand. The reverser is going forward and backward on the throttle. You're using your right hand on the automatic and the independent. So when you set the automatic air, it has to go to the independent and feather it and push the button and keep grabbing it and feather back and forth. The whole time you're like this. That's on the wide body.

* * * *

[165] * * * *

THE COURT: Were are on the record for the jury instruction conference.* * *

* * * *

[166] * * * *

THE COURT: * * * No. 4, Mr. Bax, you have an objection?

MR. BAX: I do have an objection. I think it's a misstatement of the causation standard set forth by the [167] Supreme Court's latest opinion in Norfolk and Southern versus Sorrell, and the cases cited therein.

THE COURT: Mr. Marcus, any response?

MR. MARCUS: This is a pattern instruction unmodified from the Seventh Circuit. It is the causation standard that the Court has been applying in FELA for decades and decades now.

THE COURT: The Court's going to give it over objection. * * *

* * * *

[174] * * * *

THE COURT: * * * 11.

MR. BAX: I have to ask for this one, Judge.

MR. MARCUS: We would object, Your Honor, based on the same reasons regarding causation — this is another causation instruction — for the same reason the plaintiffs have already articulated.

MR. BAX: I think proximate cause is the proper standard as set forth by the Supreme Court in Sorrell and the previous Supreme Court opinions on the issue.

THE COURT: It will be refused over objection. * * *

* * * *

[175] * * * *

THE COURT: * * * now we are on 14.

THE CLERK: Thank you.

MR. BAX: I'd better ask for this one, Judge, definition of contributory negligence on the part of the defendant. It's modified to include the FELA statute, contributed in whole or in part. Also, has the proximate cause language put in there.

MR. MARCUS: We object first about proximate cause and FELA. Also, it's duplicate 9.03 of the Seventh Circuit already covered, contributory negligence.

THE COURT: Be refused. 15.

MR. BAX: There's another instruction I have to offer. We think this is the proper standard for causation as set forth by the Supreme Court opinions that are cited as well as the Supreme Court's opinion in Norfolk Southern versus Sorrell.

MR. MARCUS: We would object to this based on the [176] same reasons.

THE COURT: The Court's going to deny 15. Same reasons. * * *

* * * *

[204] * * * *

THE COURT: Members of the jury, you have seen and heard all the evidence, and you will hear the arguments of the attorneys. Now I will instruct you on the law.

* * * *

[207] * * * *

At the time of the occurrence, there was in force a federal statute known as the Federal Employers' Liability Act. That Act provided that whenever an employee of a railroad is injured while engaged in the course of his [208] employment, the railroad shall be liable in damages to the injured employee where the injury results, in whole or in part, from the negligence of any of the officers, agents or other employees of the railroad.

Contributory negligence on the part of the injured employee will not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

The plaintiff brings this action under the Federal Employers' Liability Act or FELA. FELA requires defendant to exercise reasonable care to provide a reasonably safe workplace.

To succeed in his FELA claim, plaintiff must prove two things by a preponderance of the evidence: 1, the defendant was negligent, and 2, defendant's negligence caused or contributed to plaintiff's injuries.

Negligence is the failure to use the care that a reasonably prudent person would use in the same circumstances. The law does not say how a reasonably prudent person should act. That is for you to decide. In deciding whether defendant was negligent, you may consider industry custom or safety rules, but what is reasonable is up to you. This responsibility to exercise reasonable care includes assignments of employees to particular tasks.

Defendant "caused or contributed to" plaintiff's [209] injury if defendant's negligence played a part — no matter how small — in bringing about the injury. The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence.

If you find that defendant's negligence played a part in bringing about plaintiff's injuries, you must consider defendant's argument that plaintiff should share responsibility for his own injuries. Defendant must prove two things by a preponderance of the

evidence. First, that the plaintiff was negligent, and second, that plaintiff's negligence caused or contributed to his own injuries.

* * * *

[213] * * * *

We are now going to the hear the closing arguments of counsel. Mr. Marcus, who represents the plaintiff and has the burden of proof in this case, will have the opportunity to go first and last.

MR. BAX: Your Honor, may I move over here?

THE COURT: Yes, you may.

MR. MARCUS: Thank you, Your Honor. May it please the Court. We're almost done. Thank you for your time today.

* * * *

[214] * * * *

Bob followed the rules. He and D. J., they saw the train. They got their orders. They called the yardmaster. The yardmaster said, "Take it. Just take it." They followed the rules. They didn't complain. They are just doing their job just like most other people. Not a single CSX supervisor called Bob McBride after that. CSX did nothing after they were told that there were concerns by the people that drive their trains across public crossings that they believe these engines were not safe. If he was given the right locomotive [215] and the right train setup, this accident would never have happened.

It's hard to compare to a lot of things. But it's almost like you could take a big old sledgehammer, a big old sledgehammer, take a little tiny nail and try to use this 20-pound sledgehammer, 20-pound

sledgehammer, on a little tiny nail. Can you do it? Yes. Is it unsafe and risky? Yes. Can you hurt yourself and others? Yes. And that's what it's like. We're not saying it's the wrong equipment, it was the wrong equipment for the task.

And plaintiff would never have been put in that position if he was given the proper equipment. He would never have had to make these repetitive movements and grips with his right arm. He would never have hit his hand. It was all because of the improper equipment and use of the equipment for switching.

D. J. Baker first told the railroad that this was unsafe. We've told the railroad that this is unsafe. Now it's your turn to tell the railroad that this is unsafe.

As you just heard through the instructions, we have to prove two things. One, defendant was negligent. I just went over all the negligence that the defendant did, unsafe locomotive for switching, a big wide body, five locomotives in a setup for switching. That's all unsafe and that was negligence. It was negligence to put Bob McBride in that [216] engine seat without having any other training to switch. They didn't even look into that. That's negligent.

What we also have to show is defendant's negligence caused or contributed to Bob's injury. It never would have happened but for the defendant giving him that train.

Now, you will have an instruction, cause or contributed to cause. It says, Any part, no matter how small, no matter how small, and that's the rule, that's the law that he just instructed you on. If any part of CSX's negligence contributed to his injury no

matter how small, you have to order a verdict for the plaintiff. That's what we showed you.

* * * *

[235] * * * *

THE COURT: Ms. Glover, are you the foreperson?

JUROR GLOVER: Yes.

THE COURT: Please hand the verdict forms to the bailiff. The clerk will read the verdict.

THE CLERK: Did you find that defendant was negligent and the defendant's negligence caused or contributed to plaintiff's injury? Answer: Yes.

Number two, without taking into consideration any possible negligence by plaintiff, what sum of money did you find to be the total amount of plaintiff's damage? $275,000.

Did you find that plaintiff was negligent and that plaintiff's negligence caused or contributed to his own injury? Yes.

What percentage of plaintiff's damage do you find to have been caused by the negligence of the respective parties? Plaintiff's, 33 percent; defendant's, 67 percent.

This is signed by the foreperson and six other jurors.

Juror No. 1, Ms. Thackery, was this then and is this now your verdict?

JUROR THACKERY: Yes.

THE CLERK: Juror No. 2, Mr. Eagleson, was this then and is this now your verdict?

JUROR EAGLESON: Yes.

[236] THE CLERK: Juror No. 3, Mr. Vaughn, was this then and is this now your verdict?

JUROR VAUGHN: Yes.

THE CLERK: Juror No. 4, Ms. Glover, was this then and is this now your verdict?

JUROR GLOVER: Yes.

THE CLERK: Juror No. 5, Mr. Keehn, was this then and is this now your verdict?

MR. KEEHN: Yes.

THE COURT: Juror No. 6, Mr. Jones, was this then and is this now your verdict?

MR. KEEHN: Yes.

THE CLERK: Juror No. 7, Mr. Hartke, was this then and is this now your verdict?

MR. HARTKE: Yes.

* * * *

APPENDIX I

Plaintiff's 4

Defendant "caused or contributed to" Plaintiff's injury if Defendant's negligence played a part — no matter how small — in bringing about the injury. The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence.

Source: Seventh Circuit Jury Instructions 9.02 OK

When I use the expression "proximate cause," I mean any cause which, in natural or probable sequence, produced the injury complained of. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury.

Defendant's Instruction No. 11 Refused
IPI No. 15.01

When I use the expression "contributory negligence," I mean negligence on the part of the plaintiff that contributed in whole or in part to and proximately caused the alleged injury.

Defendant's Instruction No. 14 Refused
IPI No. 160.04

In order to establish that an injury was caused by the defendant's negligence, the plaintiff must show that (i) the injury resulted "in whole or in part" from the defendant's negligence, and (ii) the defendant's negligence was a proximate cause of the injury.

Defendant's Instruction No. 15 Refused
Non IPI
45 U.S.C. §51
Conray v. S. Pac. Co., 335 U.S. 520, 523 (1949)
Tenant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29, 32 (1944)
Brady v. S. Ry. Co., 320 U.S. 476, 483-4 (1943)
Chapman v. Union Pac. R.R., 467 N.W.2d 388, 395 (Neb. 1991)
Marazzato v. Burlington N.R. Co., 817 P.2d 672, 674-5 (Mont. 1991)

APPENDIX J

IN THE CIRCUIT COURT FOR THE CITY OF BALTIMORE, MARYLAND

CLIFTON E. EUBANKS,
Plaintiff

v.

CSX TRANSPORTATION, INC.,
Defendant

Case No. 24-C-07-007063 OT
Before the Honorable John Glynn
Jury Trial
October 28, 2008

[90] * * * *

The Plaintiff in this case has brought a negligence claim against CSX under a law known as the Federal Employees Liability Act, which is referred to as FELA, F-E-L-A. In order [91] to find the Defendant liable to the Plaintiff under FELA, you must find by a preponderance of the evidence - - and I'm going to list four things. * * *

* * * *

The two issues that are left over are, third, * * * that the Defendant or one of its employees or agents was negligent and, fourth, that such negligence was a proximate cause, in whole or in part, of the Plaintiff's injury. * * *

The fact that the Plaintiff was allegedly injured in the course of his employment [92] does not automatically entitle him to recover from the Defendant railroad. The Plaintiff can recover from the railroad under the FELA law, the law I discussed you earlier, only if negligence on the railroad's part is established

by a preponderance of the evidence and that the negligence is found to be the proximate cause of the Plaintiff's injury.

* * * *

[97] * * * *

Now, if you should find, if you find negligence against the railroad, you must consider what we call the issue of causation. In order to establish that an injury was caused by the Defendant's negligence, the Plaintiff must show that the injury resulted, in whole or in part, from the Defendant's negligence which was a proximate cause of the injury.

Accordingly, the Defendant is not responsible if any other cause or group of causes, including the Plaintiff's injury.

If you find the Plaintiff's injury was caused, at least in part, by the Defendant's negligence, you must then determine whether that negligence was a proximate cause of the Plaintiff's injury. An injury is proximately caused by the Defendant's negligence only if the Plaintiff's injury was a natural and probable consequence of the Defendant's negligence.

If the Defendant's negligence merely created an incidental condition or a situation in [98] which something else directly brought about the Plaintiff's injury, the Defendant's negligence is not the proximate cause of the injury.

* * * *

The Federal Employee Liability Act is a comparative negligence act * * *. It's comparative negligence. Therefore, if you find by a preponderance of the evidence that both the Plaintiff and the Defendant were negligent and that the negligence of each

was a proximate cause of the Plaintiff's knee injury in this case, you must find, you must then determine the percentage to which the Plaintiff's negligence contributed to his injury.

* * * *

[99] * * * *

If you find that the negligence of both Plaintiff and Defendant was the proximate cause of the Plaintiff's injuries, then the Plaintiff is referred to as being comparatively negligent, like I just discussed, and the Plaintiff is not prevented from recovering damages. Rather, the Plaintiff's damages are reduced in proportion to the amount of the [100] comparative negligence attributable to Plaintiff as will be explained on the verdict sheet.

In determining whether the Plaintiff was comparatively negligent, you apply the same definition of negligence discussed earlier. That is, did the Plaintiff take or fail to take actions which a reasonably prudent person would have taken under the circumstances. You may also apply the same rule of causation. That is, was the Plaintiff's negligence a proximate cause, in whole or in part, of his injury. Your determination should be based upon the preponderance of the evidence as I discussed earlier, more likely than not.

* * * *

APPENDIX K

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

JIMMY L. JAMES,
Plaintiff,
versus

CSX TRANSPORTATION, INC.,
A VIRGINIA COPORATION
Defendant.

CIVIL ACTION NO. 2006-00,219(1)

JURY INSTRUCTION NO. _____

In order to establish that an injury was caused by the Defendant's negligence, the Plaintiff must show that (i) the injury resulted "in whole or in part" from the Defendant's negligence, and (ii) the Defendant's negligence was a proximate cause of the injury.

JURY INSTRUCTIONS
GIVEN REFUSED WITHDRAWN
FILED 6/3 2010
JOE W. MARTIN, JR. CLERK D-11
BY S. BARROW D.C.

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

JIMMY L. JAMES,
Plaintiff,
versus

CSX TRANSPORTATION, INC.,
A VIRGINIA CORPORATION
Defendant.

CIVIL ACTION NO. 2006-00,219(1)

JURY INSTRUCTION NO. _____

The Plaintiff must first show that his injuries resulted "in whole or in part" from the Defendant's negligence. The phrase "in whole or in part" as used in this instruction means that while the Plaintiff needs not show that the Defendant's negligence was the only cause of his injuries, he must show that the Defendant's negligence played at least some part in causing the injury.

JURY INSTRUCTIONS
GIVEN REFUSED WITHDRAWN
FILED 6/3 2010
JOE W. MARTIN, JR. CLERK
BY S. BARROW D.C.

D-12

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

JIMMY L. JAMES,
Plaintiff,
versus

CSX TRANSPORTATION, INC.,
A VIRGINIA CORPORATION
Defendant.

CIVIL ACTION NO. 2006-00,219(1)

JURY INSTRUCTION NO. _____

If you find that the Plaintiff's injury was caused, at least in part, by the Defendant's negligence, you must then determine whether that negligence was a proximate cause of the Plaintiff's injuries. An injury is proximately caused by the Defendant's negligence only if the Plaintiff's injury was a natural and probable consequence of the Defendant's negligence.

JURY INSTRUCTIONS
GIVEN REFUSED WITHDRAWN
FILED 6/3 2010
JOE W. MARTIN, JR. CLERK D-14
BY S. BARROW D.C.

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

JIMMY L. JAMES,
Plaintiff,
versus

CSX TRANSPORTATION, INC.,
VIRGINIA CORPORATION
Defendant.

CIVIL ACTION NO. 2006-00,219(1)

JURY INSTRUCTION NO. _____

The Court instructs the Jury that if you find, from a preponderance of the evidence, that Jimmy L. James was guilty of negligence, as defined in other instructions of the Court, in the happening of the accident which is the subject of this suit, and if you further find, from a preponderance of the evidence, that such negligence, if any, was the sole proximate cause of said accident, then you should return a verdict for the Defendant, CSX Transportation, Inc.

JURY INSTRUCTIONS
GIVEN REFUSED WITHDRAWN
FILED 6/3 2010
JOE W. MARTIN, JR. CLERK D-3
BY S. BARROW D.C.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
OCT 18 2010
OFFICE OF THE CLERK

No. 10-235

In The

Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

ROBERT McBRIDE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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QUESTIONS PRESENTED

1. Whether the petition should be dismissed pursuant to the mootness doctrine because the petitioner and respondent have settled their controversy.

2. Whether the causation standard recognized in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), for claims asserted under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, is incorrect.

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STATEMENT OF THE CASE

The facts and procedural history of the case through the date of decision by the Court of Appeals are stated thoroughly in the opinion of that Court. *McBride v. CSX Transportation, Inc.*, 598 F.3d 388, 389-91 (7th Cir. 2010).

The Court of Appeals decided this appeal on March 16, 2010. *Id.* It denied the railroad's petition for rehearing *en banc* on June 3, 2010. App. at 1. No judge voted for rehearing. *Id.* On June 30, 2010, CSX Transportation, Inc., settled the judgment and paid Robert McBride all of the money due him under the judgment from which the appeal had been taken. App. at 3. The face of the railroad's check bears the following memorandum: "Settlement of Judgement for an on duty injury on or about April 12, 2004, at or near Mt. Vernon." *Id.*

Mr. McBride filed a Notice of Settlement and Dismissal in the District Court on July 16, 2010. App. at 4. The notice was filed through the District Court's electronic filing system and served upon counsel for the parties by that system. *Id.* CSX did not object or otherwise respond to that filing. Pursuant to the District Court's local rules, Mr. McBride also submitted a proposed order of dismissal to the Court as an attachment to an email message. App. at 5. On July 19, 2010, the Clerk of the District Court sent an email message advising counsel for both parties that the "notice of voluntary dismissal . . . is self-effectuating," that no further order would be entered by the Court,

and that "the Clerk's office has been advised to close the file." App. at 7.

CSX filed its petition for a writ of certiorari in this Court on August 18, 2010.

REASONS FOR DENYING THE WRIT

1. The petition should be denied because the parties' settlement rendered the underlying judgment moot. Article III of the Constitution posits the existence of an actual controversy as a condition of federal court jurisdiction. The issues in this case are no longer "live" between the parties and the litigation should be terminated. *United States Parole Commission of Geraghty*, 445 U.S. 388, 395 (1980).

2. There is no need to revisit the causation standard under FELA. This Court ruled more than 50 years ago that "the language of proximate causation" is not the appropriate causation standard under the FELA. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 448-49 (1957). There was nothing revolutionary in *Rogers'* assessment of FELA causation. Section 1 of the Act states that the employer is liable for a worker's injury "resulting in whole or in part from [its] negligence." 45 U.S.C. § 51. *Rogers* recognized that Congress had rejected proximate cause, under which "the defendant's negligence [must be] the sole, efficient, producing cause of injury," in favor of a relaxed causation standard:

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.

352 U.S. at 506. That relaxed causation standard has been reiterated by this Court several times and followed by every federal circuit and most state appellate courts. *See* discussion, *infra*, at 8-24.

CSX begins its argument by claiming that in *Norfolk Southern Railway v. Sorrell*, 549 U.S. 158 (2007), the Court "reserved" and "left open" the question of whether the causation standard under FELA is proximate cause, and that certiorari should be granted in this case "to resolve [that question], once and for all." (Pet. Cert. at 13.) That characterization of the principal *Sorrell* opinion suggests that the Court perceived a need to revisit the issue of FELA causation. The railroad's argument also raises the specter that the FELA causation standard somehow lacks repose 53 years after the opinion that thoroughly analyzed and explained it.

That is not what happened in *Sorrell*. Nor is there a need to resolve anew the intent of Congress with respect to FELA causation. Rather, the Court in *Sorrell* noted the railroad's attempt to "smuggle" the issue into the case and cashiered that ploy. Nothing in the principal opinion hints at an intention or need to revisit the causation standard that the Court had recognized in FELA half a century earlier. Nor does

the reasoning of Justice Souter's concurrence in that case warrant reconsideration or abandonment of the causation analysis that has governed FELA claims since *Rogers* was decided.

A. The case was rendered moot by the parties' settlement and there is no longer a justiciable controversy

"Article III of the Constitution limits federal 'Judicial Power,' that is, federal court jurisdiction, to 'Cases' and 'Controversies.'" *Geraghty*, 445 U.S. at 395. That limitation serves two purposes: (1) restricting federal courts to matters "presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," and (2) defining the role of the judiciary within the "tripartite allocation of power" to preclude courts from intruding into areas reserved for the executive and legislative branches. *Id.* at 395-96 (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). The mootness doctrine that has arisen under Article III requires that the parties continue to have a "personal interest" sufficient to assure adversarial presentation of the issues throughout the course of the litigation. *Id.* at 397. Thus a case becomes moot under Article III "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Id.* at 396 (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)).

After the Court of Appeals had rendered its decision and denied the railroad's petition for rehearing, CSX settled the case and paid Mr. McBride the money he was due under the judgment. App. at 3. The face of the check bears the following handwritten memorandum: "Settlement of Judgement for an on duty injury on or about April 12, 2004, at or near Mt. Vernon." *Id.* Mr. McBride then notified the District Court that the matter had been settled and his case was dismissed. App. at 4. The principal legal issue in this case arose from disagreement regarding the proper method of instructing the jury with respect to causation; the controversy consisted in Mr. McBride's claim for damages caused by the railroad's negligence and the railroad's denial of liability. The parties' settlement terminated the controversy.

A losing party who settles a dispute "has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994). The issues in this case "are no longer live." *Geraghty* found that the controversy was still live between the petitioners and at least some members of the putative class of respondents. 455 U.S. at 396-97. CSX and Mr. McBride are the only litigants in this case. In contrast to the circumstances that this Court found in *Geraghty*, the controversy between these parties is over. "'If a judgment has become moot [while awaiting review], this Court may not consider its merits, but may make such disposition of the whole case as justice may require.'" *Bonner Mall*, 513

U.S. at 21-22 (1994) (quoting *Walling v. James V. Reuter Co., Inc.* 321 U.S. 671, 677 (1944)).

The causation issue raised by the railroad in the present petition has become moot. The petition should be denied because CSX's settlement of its obligation under the judgment of the District Court ended the controversy between these parties and constituted a surrender of the railroad's right to further review.

B. The legislative history of the FELA makes clear that proximate cause is not the proper test for causation in cases arising under the Act.

This Court looks first to congressional intent in construing a statute. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). It "assume[s] 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" *Id.* "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1982).

Although FELA does not mention proximate cause expressly, Congress did address the issue of causation. It deliberately adopted a negligence standard different from the common law. The phrase "in whole or in part" was designed to make it clear that negligence of an employer need not be either the sole or the proximate cause of injury in order for a worker

to recover. The language adopted in 45 U.S.C. §§ 51 and 54 was not consonant with a proximate cause standard for recovery. Rather, Congress imposed another standard – causation "in whole or in part" – that by its terms did not depend upon the presence or absence of other possible causes for the recognition of employer liability. As the Court has recognized: "[T]he language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subleties can serve no useful purpose." *Coray v. Southern Pacific Co.*, 335 U.S. 520, 524 (1949).

In 1938 and 1939 Congress considered an amendment to the FELA that would have introduced a proximate cause standard into § 54, the provision covering assumption of risk. H.R. Rep. 2153, 75th Cong., 3d Sess. 1 (1938). The proposed amendment provided:

> In any action brought against any common carrier . . . such employee shall not be held to have assumed the risks of his employment in any case where . . . the negligence of such common carrier, its officers, agents, or employees, proximately contributed to the injury or death of such employees.

The House attempted to add the words "proximate cause," which had not been included in the version of the bill passed by the Senate. 42 Cong. Rec. 10,709-10 (1939). The phrase "proximate cause" was stripped from the House version in the conference committee

in favor of the Senate bill. *See* Act of Cong., August 11, 1939, Chapter 685, 53 Stat. 1404.

The language adopted in the 1939 amendment of FELA has remained unchanged for more than 70 years. Congress is presumed to be aware of this Court's interpretation of a statute, *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978), and has taken no action to alter the causation standard recognized in *Rogers*. Moreover, Congress has rebuffed the railroad industry's repeated attempts to have the Act repealed. *See, e.g., Federal Employers' Liability Act: Hearing Before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 101st Cong., 1st Sess. (1989); *Railroad Safety Programs: Hearings Before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 102nd Cong., 1st Sess. 178-80 (1991); *The Impact of Railroad Injury, Accident and Discipline Policies on the Safety of American Railroads: Hearing Before the House Committee on Transportation and Infrastructure*, 110th Cong., 1st Sess. 238, 243-46 (Oct. 25, 2007) (statement of Edward Hamberger, President and Chief Executive Officer, American Association of Railroads).

C. For more than 50 years this Court and others have interpreted FELA as not requiring a plaintiff to establish proximate cause

Rogers recognized that FELA "was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant," and that the statute "supplant[ed] that duty with the far more drastic duty of paying damages for injury . . . at work due in whole or in part to the employer's negligence." 352 U.S. at 507. *Rogers* tied the relaxed causation threshold to a specific legislative purpose of getting the claims of injured railroad workers to juries:

> The Congress when adopting the law was particularly concerned that the issues whether there was employer fault and whether that fault played any part in the injury . . . of the employee should be decided by the jury whenever fair-minded men could reach these conclusions on the evidence.

Id. at 508.

The state court ruling that gave rise to *Rogers* had held that in order for a railroad's negligence to be actionable under the FELA, "there must not only be a causal connection so that the injury would not have occurred but for the negligence, but such negligence must also be a proximate (legal) cause of the injury." *Rogers v. Missouri Pacific Railroad Co.*, 284 S.W.2d 467, 471 (Mo. 1955). This Court stated that it had granted certiorari in *Rogers* "to prevent [the Act's] erosion by narrow and niggardly construction." 352

U.S. at 509. The Court chastised the state tribunal "for fail[ing] to take into account the special features of this statutory negligence action that make it significantly different from the ordinary common law negligence action." *Id.* at 509-10. And the Court held in particular that the proximate cause standard was not the correct test for employer liability under the FELA:

> Under the FELA the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury . . . for which damages are sought.

Id.

The Court has reaffirmed that proximate cause is not appropriate under FELA in subsequent opinions.[1] In *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108 (1963), where an employee was bitten by an insect while working near a stagnant pool, the Court quoted at length from *Rogers* and held that negligence could be found if the railroad had played any role in producing the harm. *Id.* at 116-17. The Court concluded that there can be a jury question of causation when there is "evidence that any employer

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[1] The railroad attempts to take comfort from pre-*Rogers* decisions. Appellant's Br. at 28-31. These cases are of no relevance here, because *Rogers* made it clear that such cases could not have been correct in their interpretation of the statutory phrase "in whole or in part." 352 U.S. at 507-08.

negligence caused the harm, or, more precisely, enough to justify a jury's determination that employer negligence had played any role in producing the harm." *Id.* at 116.

Soon after, in *Dennis v. Denver & R. G. W. Railroad Co.*, 375 U.S. 208 (1963), where a railroad worker lost two fingers to frostbite and sought recovery based on negligent supervision of his working conditions, the Court quoted *Rogers* for the proposition that a railroad employer is subject to liability "[o]nce it is shown that 'employer negligence played any part, even the slightest, in producing the injury.'" *Id.* at 210 (quoting *Rogers*, 352 U.S. at 506).

In *Crane v. Cedar Rapids & Iowa City Railway Co.*, 395 U.S. 164 (1969), a FELA case arising from a violation of the Safety Appliance Act of 1893, 45 U.S.C. § 2, the Court cited *Rogers* as part of the authority for a causation standard that does not require a finding of proximate cause. *Id.* at 166. *Crane* stated specifically that a plaintiff proceeding under the FELA "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's [negligence]." 395 U.S. at 166 (quoting 45 U.S.C. § 51).

In *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532 (1994), the Court acknowledged its history of construing the FELA "liberally . . . to further Congress' remedial goal." *Id.* at 543. As an example of that practice, *Gottshall* noted the Court's

determination in *Rogers* "that a relaxed standard of causation applies under FELA." *Id.* The Court reiterated its ruling that "'[u]nder this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" *Id.* (quoting *Rogers*, 352 U.S. at 506).

In *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003), six former railroad workers suffering from asbestosis sought recovery under the FELA and the railroad sought to avoid or limit liability for their condition. 538 U.S. at 140-41. Observing that the company's argument for reading a limitation of railroad liability into the statute "asks us to narrow employer liability without a textual warrant [and] . . . also runs counter to a century of FELA jurisprudence," the Court recalled its analysis of the Act in *Rogers* as authority for rejecting the employer's request for judicial narrowing of Congress' language: "In *Rogers*, we described as 'irrelevant' the question 'whether the immediate reason' for an employee's injury was the proven negligence of the defendant railroad or 'some cause not identified from the evidence.'" 538 U.S. at 161-62 (quoting *Rogers*, 352 U.S. at 503).

The railroad dismisses both *Crane's* and *Gottshall's* reiteration of the *Rogers* language rejecting a proximate cause standard as "dictum." (Pet. Cert. at 21-22.) Principles of law incorporated into this Court's opinions, even as dictum, are not to be disregarded as

random thoughts or extraneous notions. In a separate opinion in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), joined by the Chief Justice and two other Justices, Justice Kennedy wrote: "As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law." *Id.* at 668 (Kennedy, J., concurring in part and dissenting in part); *see Florida Central Railroad Co. v. Schutte*, 103 U.S. 118, 143 (1880) (noting that "[i]t cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter"); *see* discussion of *stare decisis*, *infra*, at 24-26.

The railroad also argues that both *Gottshall* and *Crane* are consistent with the view that *Rogers* addressed only the issue of multiple causes. (Pet. Cert. at 21-22.) Neither of those cases suggested that the presence of multiple causes was a controlling consideration in *Rogers*. Of course multiple causes are encompassed within the principle set forth in *Rogers*. Several subsequent decisions of this Court make it clear that the relaxed causation standard recognized in that opinion is not limited to multiple-cause cases:

- In *Gallick v. Baltimore & Ohio Railway Co.*, 372 U.S. 108 (1963), the single cause of injury was an insect bite and the railroad's negligence consisted in maintaining a "fetid pool" containing "dead and

decayed rats and pigeons" and inhabited by insects near the location at which the claimant worked briefly and was bitten. 372 U.S. at 113-14. The Court quoted and adhered to the relaxed causation standard it had articulated in *Rogers*. *Id.* at 115-16.

- The plaintiff in *Dennis* suffered frostbite and ultimately lost two fingers after working a 12-hour overnight shift in extremely cold weather without adequate protective clothing. 375 U.S. at 209. There was evidence sufficient to prove that a foreman who controlled the worker's activity throughout the shift knew of the danger and failed to take reasonable precautions to prevent the injury. *Id.*

- In *Crane* the claimant was injured while trying to stop runaway train cars. He fell from the top of one of the cars onto a cement apron. The sole cause of injury submitted to the jury was the railroad's negligent maintenance of a freight car with a defective coupler. 395 U.S. at 165-66.[2]

- The railroad employee in *Gottshall* sought recovery under FELA for negligent infliction of emotional distress. 512 U.S. at 535-37. One of the crew members suffered a heart attack. The railroad had taken its radio base station off the air for repairs, and

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[2] In *Ayers*, a case seeking recovery for asbestosis, the Court noted that it is irrelevant whether the immediate cause of an employee's injury was the proven negligence of the defendant railroad or some cause not identified in the evidence. 538 U.S. at 161-62.

the crew members were unable to obtain medical assistance before the stricken worker died. Mr. Gottshall later was admitted to a psychiatric institution and diagnosed as suffering from depression and post-traumatic stress disorder. He sued, alleging that the railroad had been negligent in creating circumstances under which he was forced to observe and participate in the events attendant to his colleague's death. No other cause of injury was alleged. This Court noted both its practice of "liberally construing] FELA to further Congress' remedial goal" and the "relaxed standard of causation" found applicable to FELA claims in *Rogers*. 352 U.S. at 543.

- In *McBride v. Toledo Terminal Railroad Co.*, a worker claimed that the railroad's failure to provide adequate workplace lighting had caused him to slip while descending an icy ladder on a rail car. *See McBride v. Toledo Terminal Railroad Co.*, 140 N.E.2d 319, 320 (Ohio), *rev'd per curiam*, 354 U.S. 517 (1957).

CSX also contends that there is a conflict among "the lower courts" about whether FELA requires proof of proximate causation. (Pet. Cert. at 22-27.) The notion of widespread uncertainty and disagreement suggested by the railroad is untenable. All of the federal circuits and the great majority of state courts have followed this Court's interpretation of the FELA causation standard:

First Circuit

In its first post-*Rogers* decision the court noted both its prior requirement that plaintiffs establish proximate cause in order to recover under the FELA and its need to conform to the "contrary principles laid down" by the Supreme Court. *Boston & Maine Railroad v. Talbert*, 360 F.2d 286, 288 (1st Cir. 1966) (citing *New York, New Haven and Hartford Railroad Co. v. Dox*, 249 F.2d 572 (1st Cir. 1957), and *Rogers*, 352 U.S. at 506). The railroad relies on *Talbert* as authority for its claim that the First Circuit requires proof of proximate causation in FELA cases and that there is a split among the circuits on this issue. (Pet. Cert. at 23 n.6.) But the First Circuit subsequently aligned itself with all of the other federal circuits:

> We recognize the considerably relaxed standard of proof in FELA cases. The test for minimally adequate proof of causation is "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury." But although a plaintiff need not make a showing that the employer's negligence was the sole cause, there must be a sufficient showing (*i.e.*, more than a possibility) that a causal relation existed.

Moody v. Maine Central Railroad Co., 823 F.2d 693, 695 (1st Cir. 1987) (quoting *Rogers*, 352 U.S. at 506).

Second Circuit

The Second Circuit acknowledged *Rogers* in *Nicholson v. Erie Railroad Co.*, 253 F.2d 959 (2nd Cir. 1958):

> It is true that, to impose liability on the defendant, the negligence need not be the proximate cause of the injury. The F.E.L.A. has its own rule of causation. The injury need only be one "resulting in whole or in part" from the negligence. 45 U.S.C. § 52. The question of causation is one for the jury if "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury."

Id. at 940 (quoting *Rogers*, 352 U.S. at 506); *see also Williams v. Long Island Railroad Co.*, 196 F.3d 402, 406 (2d Cir. 1999) (quoting *Rogers* and stating that "a relaxed standard applies in FELA cases so that an employer is liable for injuries caused 'in whole or in part' by the employer's negligence").

Third Circuit

In *Hines v. Consolidated Rail Corp.*, 926 F.2d 262 (3d Cir. 1991), the Third Circuit cited *Rogers* and *Gallick* as the most notable in a line of decisions in which this Court had recognized the expanded concept of causation created in the FELA. *Id.* at 267. The Court of Appeals stated:

> In *Rogers*, the Court held that "the test of a [FELA] jury case is simply whether the

> proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury . . . Similarly, in *Gallick*, the Court stated that there can be a jury question of causation when there is "evidence that any employer negligence caused the harm, or, more precisely, enough to justify a jury's determination that employer negligence had played any role in producing the harm."

Id. (quoting *Rogers*, 352 U.S. at 306, and *Gallick*, 372 U.S. at 116); *see also Pehowic v. Erie Lackawanna Railroad Co.*, 430 F.2d 697, 699-70 (3d Cir. 1970) (holding that causation is an issue for the jury except in "extremely rare" cases in which there is no probability that any employer negligence contributed to the employee's injury).

Fourth Circuit

The Fourth Circuit acknowledged in a Jones Act case that the FELA calls for a "relaxed . . . standard of causation" under which employer liability is imposed "whenever 'employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 436 (4th Cir. 1999) (quoting *Rogers*, 352 U.S. at 506, and *Gottshall*, 512 U.S. at 543); *see also Estate of Larkins v. Farrell Lines, Inc.*, 806 F.2d 510, 512 (4th Cir. 1986) (recognizing the "light burden of proof on negligence and causation" established for the plaintiff in a FELA

or Jones Act case and noting the particular statutory emphasis on having such claims decided by juries); *Brown v. Baltimore & Ohio Railroad Co.*, 805 F.2d 1133, 1137 (4th Cir. 1986) (quoting *Rogers* as authority for "this most lenient standard of proof" with respect to causation in an FELA action).

Fifth Circuit

In *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997), a unanimous *en banc* decision, the Fifth Circuit noted that this Court had used the term "slightest" in *Rogers* "to describe the reduced standard of causation between the employer's negligence and the employee's injury" in FELA cases. *Id.* at 335. And in *Nivens v. St. Louis Southwestern Railway Co.*, 425 F.2d 114 (5th Cir. 1970), the court quoted at length from *Rogers* and held that "the common-law proximate cause standard is modified, and the employee has a less demanding burden of proving causal relationship." *Id.* at 118 (quoting *Rogers*, 352 U.S. at 506-08).

Sixth Circuit

The Sixth Circuit recognized in *Hausrath v. New York Central Railroad Co.*, 401 F.2d 634 (6th Cir. 1968), that in the FELA "Congress deliberately adopted a negligence standard different from that of the common law," and that the statutory phrase "'in whole or in part' was obviously designed to make even more explicit that negligence of an employer did not

have to be the sole cause or 'the proximate cause' of the injury." *Id.* at 637. Later, in *Richards v. Consolidated Rail Corp.*, 330 F.3d 428 (6th Cir. 2003), the court noted that *Rogers* had adopted a relaxed causation standard "in order to effectuate Congress' intent . . . 'to preserve the plaintiff's right to a jury trial.'" And in *Aparicio v. Norfolk & Western Railway Co.*, 84 F.3d 803 (6th Cir. 2003), the court concluded that *Rogers* requires a plaintiff alleging a FELA violation to offer "more than a scintilla of evidence in order to create a jury question on the issue of employer liability, but not much more." *Id.* at 810.

Seventh Circuit

The Seventh Circuit has recognized and followed this Court's opinions regarding the FELA causation in prior cases as well as this one. The court has held:

> Because it is meant to offer broad remedial relief to railroad workers, a plaintiff's burden when suing under the FELA is significantly lighter than in an ordinary negligence case. Indeed, a railroad will be held liable where "employer negligence played any part, even the slightest, in producing the injury.

Holbrook v. Norfolk Southern Railway Co., 414 F.3d 739, 741-42 (7th Cir. 2005); *see also Harbin v. Burlington Northern Railroad Co.*, 921 F.2d 129, 130-31 (7th Cir. 1990) (quoting *Rogers* and recognizing that "[i]t is well established that the quantum of evidence

required to establish liability in an FELA case is much less than in an ordinary negligence action").

Eighth Circuit

In *Nordgren v. Burlington Northern Railroad Co.*, 101 F.3d 1246 (8th Cir. 1996), the Eighth Circuit cited *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557 (1987), as authority for the statement that "[t]he Supreme Court has recognized FELA as a broad remedial statute and has construed FELA liberally in order to accomplish Congress' goals," and *Rogers* as authority for the particular proposition that FELA establishes a relaxed standard for causation. And in *Paul v. Missouri Pacific Railroad Co.*, 963 F.2d 1058 (8th Cir. 1992), the court noted that "[u]nder FELA, the plaintiff carries only a slight burden on causation," and recognized that "[i]t is only when plaintiff's act is the sole cause – when defendant's act is no part of the causation – that defendant is free from liability." 963 F.2d at 1061 (quoting *Rogers*, 352 U.S. at 506, and *Grand Trunk Western Railway v. Lindsay*, 233 U.S. 42, 47 (1914)).

Ninth Circuit

The Ninth Circuit cited *Rogers* in support of the proposition that "[t]he standard for receiving a jury trial is less stringent in FELA cases than in common law tort cases." *Mullahon v. Union Pacific Railroad*, 64 F.3d 1358, 1363 (9th Cir. 1995). The court explained:

> Although federal courts have generally rejected the "scintilla rule" that any evidence supporting a tort claim raises a jury question, courts have applied a rule very much like the "scintilla rule" to FELA cases. In FELA cases, "it is only necessary that the jury's conclusion be one which is not outside the possibility of reason on the facts and circumstances shown.

Id. at 1363-64. It noted that "[t]his relaxed standard applies to both negligence and causation determinations." *Id.* at 1364 (citing *Rogers*, 352 U.S. at 506). The court articulated the requirements for proof of causation in a FELA case:

> [U]nder FELA the quantum of evidence sufficient to present a jury question of causation is less than it is in a common law tort action Under FELA, the jury should determine liability so long as the evidence justifies "with reason, the conclusion that employer negligence played any part, even the slightest, in producing the injury." This . . . means only that in FELA cases the negligence of the defendant "need not be the sole cause or whole cause" of the plaintiff's injuries. FELA plaintiffs still must demonstrate some causal connection between a defendant's negligence and their injuries.

Claar v. Burlington Northern Railroad Co., 29 F.3d 499, 503 (9th Cir. 1994) (internal citations omitted) (quoting Rogers, 532 U.S. at 507, and *Oglesby v. Southern Pacific Transportation Co.*, 6 F.3d 603, 608

(9th Cir. 1993)); *see also Mendoza v. Southern Pacific Transportation Co.*, 733 F.2d 631, 632 (9th Cir. 1984) (observing that "courts have held that only 'slight' or 'minimal' evidence is needed to raise a jury question of negligence under FELA").

Tenth Circuit

In *Summers v. Missouri Pacific Railroad System*, 132 F.3d 599 (10th Cir. 1997), the court quoted the statutory provision that a railroad employer is liable for injury to its employee "resulting in whole or in part" from its negligence. 132 F.3d at 606 (quoting 45 U.S.C. § 51). Then the court stated: "During the first half of this century, it was customary for courts to analyze liability under the FELA in terms of proximate causation. However, the Supreme Court definitively abandoned this approach in *[Rogers]*." *Id.* The court next quoted *Rogers* at length and concluded: "A jury instruction containing both the statutory language and the explanatory language of Rogers is certainly the clearest articulation of the appropriate causation standard." *Id.* at 607.

Eleventh Circuit

Comeaux v. T. L. James & Co., 702 F.2d 1023 (5th Cir. 1983), a case that arose in Louisiana prior to the division of the former Fifth Circuit, characterized the plaintiff's burden of proof with respect to causation as "featherweight" and stated that "[t]he 'producing cause' FELA standard" contemplates evidence

"incorporating any cause regardless of immediacy." *Id.* at 1024. The Eleventh Circuit held more recently that "[u]nder FELA, a carrier will be liable if its negligence 'played any part, even the slightest, in producing the employee's injury.'" *Sea-Land Service, Inc. v. Sellan*, 231 F.3d 848, 851 (11th Cir. 2000).

District of Columbia Circuit

In *Brooks v. Washington Terminal Co.*, 593 F.2d 1285 (D.C. Cir. 1979), the District of Columbia Circuit adopted the relaxed causation standard that *Rogers* had declared:

> The test whether an F.E.L.A. case should be submitted to the jury "is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

Id. at 1288 (quoting *Rogers*, 532 U.S. at 506. The court noted the "liberality" of this causation test and stressed the Congressional intent that liability in FELA cases be determined by juries whenever possible: "Thus, unless 'fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury,' the case should be decided by the jury." *Id.* (quoting *Rogers*, 532 U.S. at 510).

State Courts

CSX effectively admits that a great majority of state courts have recognized and adhere to the relaxed causation standard recognized in *Rogers*. (Pet. Cert. at 23.) Further, the approach to FELA causation actually articulated by several of the minority state courts cited by CSX adds scant weight to the argument for review of the statutory causation standard by this Court.

The railroad places its greatest reliance upon *Raab v. Utah Railway*, 221 P.3d 219 (Utah 2009), which concluded that FELA requires proof that a railroad's negligence was the proximate cause of a claimant's injury. *Id.* at 228-29. The petition argues that this opinion reflects a "pervasive confusion over the meaning of one of this Court's decisions." (Pet. Cert. at 26-27.) CSX claims that seven additional state courts of last resort have concluded that the FELA causation standard is proximate cause. Neither *Raab* nor the other state court decisions cited by the railroad reflect "pervasive confusion" about the statutory causation standard.

The Utah Supreme Court acknowledged that this Court has cited *Rogers* "for the proposition that 'a relaxed standard of causation applies under the FELA.'" 221 P.2d at 228 (quoting *Gottshall*, 512 U.S. at 543). It also recognized that every federal appellate court that has ruled on the issue "has held that Rogers eliminates the obligation of a FELA negligence plaintiff to prove proximate cause." *Id.* Whatever the *Raab*

opinion may represent – and Mr. McBride submits that it represents a single instance of aberrant analysis and inappropriate repudiation of binding authority – it is not "pervasive confusion" abroad in the judiciary with respect to this Court's causation analysis and holding in *Rogers*.

CSX relies upon *Snipes v. Chicago, Central & Pacific Railway Co.*, 484 N.W.2d 162 (Iowa 1992), as authority that the Iowa Supreme Court does not adhere to the relaxed causation standard recognized in *Rogers*. (Pet. Cert. at 23 n.6.) Although *Snipes* does make perfunctory reference to proximate cause as the causation standard, it attributes that reference to this Court's 1944 opinion in *Tennant v. Peoria & Pekin Union Railway*, 321 U.S. 29 (1944). *Tennant* was handed down more than a decade before the Court analyzed Congressional intent regarding the causation standard in *Rogers*.

In *Snipes* the Iowa Supreme Court quoted and plainly acknowledged that analysis: "'Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played a part, *even the slightest*, in producing the injury or death for which damages are sought.'" 484 N.W.2d at 165 (quoting *Rogers*, 352 U.S. at 506) (emphasis added by Iowa court)). *Snipes* proceeded to observe that "[t]his low threshold for recovery" was reaffirmed in *Gallick*. *Id.*

Neither does *Brabeck v. Chicago & Northwestern Railway*, 117 N.W.2d 921, 923 (Minn. 1962), support

the notion that Minnesota courts reject the causation standard recognized in *Rogers*. (Pet. Cert. at 23-24 n.6.) In *Narusiewicz v. Burlington Northern Railway Co.*, 391 N.W.2d 895 (Minn. App. 1986), a quarter of a century more recent than *Brabeck*, the Court of Appeals quoted *Rogers* regarding FELA's relaxed causation standard and placed its own emphasis on the proposition that a railroad is liable if its negligence "played any part, no matter how small," in bringing about the worker's injury. *Id.* at 898-99. The Minnesota court explained: "The FELA standard dispenses with the 'substantial factor' requirement of proximate cause, as well as other aspects of the common-law definition of proximate cause." *Id.* at 899.

CSX is just as wrong about Ohio. It cites *Reed v. Pennsylvania Railroad*, 171 N.E.2d 718 (Ohio 1961), as authority for a proximate cause standard under FELA. (Pet. Cert. at 24 n.6.) The current state of FELA causation in Ohio was summarized in *Martin v. CSX Transportation, Inc.*, 922 N.E.2d 1022 (Ohio App. 2009). The Court of Appeals stated:

> Ohio courts have recognized that in FELA cases, "the traditional concept of proximate cause is supplanted by the less stringent standard that there be some causal relation, no matter how slight, between the injury and the railroad's breach of duty.

Id. at 1033-34.

D. The decisions of this Court, all of the federal Circuit Courts, and most state appellate courts have the persuasive force of *stare decisis*

The decisions of this Court and the lower courts that have followed those opinions are entitled to the particular deference accorded rulings based on the interpretation of statutes. "[C]onsiderations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 736 (1977). The doctrine of *stare decisis* "carries such persuasive force that [this Court has] always required a departure from precedent to be supported by some 'special justification.'" *United States v. International Business Machines Corp.,* 517 U.S. 843, 856 (1996) (quoting *Payne v. Tennessee,* 501 U.S. 808, 842 (1991) (Souter, J., concurring)).

Stare decisis is most compelling in a pure question of statutory construction. *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 205 (1991). It is particularly forceful when the interpretation of a statute has been accepted as settled law for several decades. *SBP, Inc. v. Alvarez,* 546 U.S. 21, 32 (2005); *see also Neal v. United States*, 516 U.S. 284, 295 (1996) (recognizing that absent exceptional intervening circumstances "our system demands that we adhere to our prior interpretations of statutes"). Justice Breyer has lately explained:

> [T]he Court has said that the principle of stare decisis applies more rigorously when a statute, rather than a constitutional provision, is at issue. That is because Congress can easily change a statutory decision, but neither Congress nor anyone else can easily amend the Constitution.

Stephen Breyer, Making Our Democracy Work: A Judge's View 151-52 (2010).

The petition presently before the Court urges the Court to abandon a statutory interpretation that it adopted more than 50 years ago, that it has reiterated several times since without equivocation, and that federal and state appellate and trial courts have followed with rare exception throughout that time. In issuing that invitation the petitioner necessarily has made light of *stare decisis*. Despite the care that the Court took in *Rogers* to explain its analysis of Congress' intent with respect to the causation element of a FELA claim and without meaningful regard for the Court's reiteration of the standard in subsequent opinions, CSX suggests however obliquely that the analysis was sloppy and the exegesis worse. (Pet. Cert. at 16-22.) The demand for abandonment of precedent requires a gravity that the railroad has failed to muster.

The Court has recognized that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Planned Parenthood of Southeastern Pennsylvania v. Casey,*

505 U.S. 833, 854 (1992). There the Court proceeded to say "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." *Id.* at 864. The Court's analysis of the causation standard intended by Congress for FELA claims was clear and prudent. The attack on precedent staged by CSX in this case should find no better reception here and now than it has received from this Court and other federal courts in the railroads' continuous attempts to avoid the language of the Act and this Court's interpretation of that language in *Rogers*.

E. The railroad's reliance on Justice Souter's concurring opinion in *Sorrell* is misplaced

Nothing in the principal opinion in *Sorrell* suggests that the Court intended to undermine or dislodge decades of jurisprudence recognizing a significantly relaxed causation standard for plaintiffs in FELA cases. Justice Ginsburg began her separate opinion in that case with the following observation:

> It should be recalled . . . that the Court has several times stated what a plaintiff must prove to warrant submission of a FELA case to a jury. That question is long settled, we have no cause to reexamine it, and I do not read the Court's decision to cast a shadow of doubt on the matter.

Sorrell, 549 U.S. at 177 (Ginsburg, J., concurring). The railroad's argument to the contrary should find no purchase in this Court now.

In *Gottshall* the Court recognized that "a relaxed standard of causation applies under FELA." 512 U.S. at 543. In *Crane* the Court said that a FELA plaintiff need prove "only that his injury resulted in whole or in part from the railroad's violation." 395 U.S. at 155. Both of those decisions referred to *Rogers*, which had declared: "Under [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S. at 506.

Rogers in turn drew upon *Coray v. Southern Pacific Co.*, 335 U.S. 520 (1949), in which the Court had observed: "Congress . . . imposed extraordinary safety obligations upon railroads and has commanded that if a breach of these obligations contributes in part to an employee's death, the railroad must pay damages." *Id.* at 524. Those decisions – not a concurring opinion of three Justices in a single case – are the salutory foundation for the rule that the causation standard applicable to FELA cases is more "relaxed" than the common law standard applicable in tort litigation generally.

1. The "In Whole or In Part" Liability of Railroads Cannot Be Limited to Multi-Cause FELA Claims

Under Justice Souter's analysis, at least as interpreted by CSX, both the plaintiff and the defendant would have to allege multiple causes for an injury before the jury can be instructed about the FELA mandate that railroads are liable for injuries caused "in whole or in part" by their negligence. *See Sorrell*, 549 U.S. at 175 (Souter, J., concurring) (stating that *Rogers* "did not address and should not be read as affecting the necessary directness of cognizable causation, as distinct from the occasional multiplicity of causations"). Limiting FELA's declaration of liability for injuries caused "in whole or in part" by railroad negligence to the occasional multiple-cause case would eviscerate the Congressional mandate.

The standard that the railroad purports to derive from Justice Souter's concurring opinion in *Sorrell*, dependent as it is upon the notion that the "relaxed" standard recognized for the past several decades actually has application only to cases in which an injury is shown to have had more than one possible cause, would not be workable in the context of FELA litigation. The railroad has advanced a paradigm under which the plaintiff and the defendant would have to allege a multiplicity of "causes" before the trial court could instruct jurors about the Act's liability-defining phrase "in whole or in part." The causation language chosen by Congress – that a railroad is to be liable whenever its negligence is responsible

"in whole or in part" for a worker's injury – would be disabled whenever the parties to a FELA case did not allege a total of at least two causes for the plaintiff's injury.

2. Congress Clearly Addressed Causation Under FELA

Justice Souter apparently could not find a Congressional intent regarding an instruction for the submission of causation in a FELA case. *Id.* at 176-77 (stating that "[w]hether FELA is properly read today as requiring proof of proximate causation before recognizing negligence is up to the Missouri Court of Appeals to determine in the first instance"). Having specified that railroads were to be liable when their negligence caused injury or death "in whole or in part," Congress defined causation under the Act and had no need to include the specifics of a causation instruction in the statute or in its legislative history.

3. Justice Souter's Concurrence Conflicts With Congressional Intent that FELA Be Afforded a Liberal Construction

The entire history of the FELA reflects the Congressional purpose of protecting railroad employees, and the Supreme Court always has accommodated that legislative intent by affording the Act a liberal construction. For example, in 1938 and 1939 the railroads sought without success to have the phrase "proximate cause" inserted into § 54 of the Act. *See*

H.R. Rep. 2153, 75th Cong., 3d Sess 1 (1938); 42 Cong. Rec. at 10,709-10 (1939); Act of Cong., Aug. 11, 1939, Ch. 685, 53 Stat. 1404. Justice Souter's concurrence would curtail employee protection under the law and is in conflict with that intent.

4. A Proximate Cause Instruction Would Alter The Statutory Definition of FELA Causation

Railroads have a non-delegable duty to provide their employees with a safe place to work. *See, Sinkler v. Missouri Pacific R.R.*, 356 U.S. 326330, 331-32 (1958); *Shenker v. Baltimore & Ohio R.R.*, 374 U.S. 1, 7 (1963). The proximate cause instruction sought by the railroads and apparently envisioned by Justice Souter would transmogrify "in whole or in part" FELA causation, requiring proof instead that railroad negligence was a substantial, as well as actual, factor in causing the injury or death. Under such a standard an employee could not recover against a railroad when it was the least negligent of several negligent parties.

5. *Rogers* Did Clearly State the FELA Causation Standard

Justice Souter's concurring opinion suggests that *Rogers* was unclear in articulating its causation standard for FELA cases:

> True, I would have to stipulate that clarity was not well served by the statement in Rogers that a case must go to a jury where "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

Sorrell, 549 U.S. at 175 (Souter, J., concurring). That suggestion cannot be squared with the facility demonstrated by this Court and lower courts in discussing and applying that standard through the ensuing 50-plus years. The *Rogers* opinion itself restated the standard with ample clarity:

> Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death.

352 U.S. at 506-07. As Justice Ginsburg wrote in her *Sorrell* concurrence: "[I]n Rogers we held that a FELA plaintiff can get to a jury if he can show that his employer's negligence was even the slightest cause of his injury." 549 U.S. at 179.

6. This Court Would Depart From Overwhelming Authority If It Embraced Justice Souter's FELA Causation Analysis

Adopting Justice Souter's analysis would require this Court to abandon or ignore (a) the Supreme Court's historic and often-stated recognition that

Congress intended FELA to be given the liberal interpretation commonly afforded remedial legislation, (b) the plain meaning of the words "in whole or in part," (c) *stare decisis*, and (d) the railroads' concession in *Rogers*, *Sorrell*, and *Ayers* that the causation standard for FELA claims is something less than common law proximate cause.

CSX purports to isolate Justice Ginsburg's concurrence and "[t]he lower courts" that have followed *Rogers*' interpretation of the FELA causation language as some sort of judicial brigade that has gone rogue and "interpreted [Rogers] to abrogate traditional proximate causation." (Pet. Cert. at 13-14.) First, "traditional proximate causation" has not been abrogated: the standard of proof that must be met to make a submissible showing of causation in a railroad worker's statutory injury claim merely was relaxed in the service of a clear Congressional purpose and in accordance with specific statutory language. *See, e.g.*, *Rogers*, 352 U.S. at 507; *Gottshall*, 512 U.S. at 543. More to the point, it was Congress – not Justice Ginsburg and some smattering of upstart "lower courts" – that effected the relaxation. There is no guerilla campaign or gonzo posse of outlier judges robbing the railroads of a civil entitlement. The relaxed causation standard that Congress wrote into the FELA has been the law of the land for a long time.

For decades neither this Court nor any federal appellate court – and virtually no other court anywhere, excepting the handful cited by the railroad –

has required plaintiffs in FELA cases to satisfy a common law proximate cause standard. The establishment of a more demanding burden of proof for cases brought by injured railroad workers would be singularly out of step with the unbroken line of decisions recognizing the FELA as remedial legislation deserving of liberal construction in order to effectuate its clear purpose. *See, e.g., Gottshall*, 512 U.S. at 542-43.

Such a change in the interpretation and application of the Act also would be impossible to square with more than a century of legislative history, marked consistently by the recognition of railroad worker needs, the creation of statutory rights and remedies tailored to those needs, and the unambiguous rejection of efforts to augment the evidentiary burden of FELA plaintiffs with respect to causation. The causation standard intended by Congress for FELA claims has been well and accurately interpreted. There is no need for this Court to reconsider that standard or consider this appeal further.

CSX concludes that the issue of FELA causation is a matter of exceptional importance. (Pet. Cert. at 28-29.) It is. But the issue today is no more important than it was when this Court resolved it in *Rogers*, or each time thereafter that the Court, every federal appellate circuit, and most state appellate courts reiterated the standard that was recognized in *Rogers*. The FELA establishes a standard of "in whole or in part" causation that replaced the conventional formulation of proximate causation for the negligence

claims of injured railroad workers. That proposition has stood since this Court announced it more than 50 years ago. It does not require "resolution, once and for all," at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted by:

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Counsel for Respondent

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 3, 2010

Before

KENNETH F. RIPPLE, *Circuit Judge*

ILANA D. ROVNER, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 08-3557

ROBERT McBRIDE, *Plaintiff-Appellee,* *v.* CSX TRANSPORTATION, INC., *Defendant-Appellant.*	Appeal from the United States District Court for the Southern District of Illinois. No. 3:06-cv-01017-JPG-CJP J. Phil Gilbert, *Judge.*

ORDER

(Filed June 3, 2010)

Upon consideration of appellant's petition for rehearing en banc, filed on March 29, 2010, and the answer of appellees, filed on May 13, 2010, no judge in active service has requested a vote thereon and the judges on the original panel have voted to deny the petition.* Accordingly,

---

* Judge Flaum took no part in the consideration or decision of the petition for rehearing en banc.

IT IS ORDERED that the petition for rehearing en banc is hereby DENIED.

CSX TRANSPORTATION, INC.
GENERAL CLAIMS DEPARTMENT

93-162
433

No.

PAY TO THE ORDER OF

DATE JUNE 30, 2010

ROBERT K. McBRIDE AND his ATTORNEY KUJAWSKI & ASSOCIATES 183,956.09

One Hundred Eighty Three Thousand Nine Hundred Fifty Six + 09/100 ---------- DOLLARS

FOR SETTLEMENT OF JUDGEMENT FOR AJ ON Duty Injury ON OR ABOUT APRIL 12, 2004 AT OR NEAR MT. VERNON

Inv c# R0000026 98

To Treasurer, CSX TRANSPORTATION, INC.
Through PNC BANK, N.A.

Thomas Drummond

VOID AFTER 90 DAYS

Clarke American 2000 (800) 669-1479

App. 3

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBERT MCBRIDE,	)	
Plaintiff,	)	
vs.	)	**No.: 3:06-cv-01017-JPG-CJP**
CSX TRANSPORTATION, INC.,	)	
Defendant.	)	

NOTICE OF SETTLEMENT AND DISMISSAL

COMES NOW the Plaintiff, Robert McBride, by and through his attorneys, Kujawski & Associates, P.C., and for his Notice of Settlement, respectfully states as follows:

1. That on March 16, 2010, The United States Court of Appeals for the Seventh Circuit entered final judgment, affirming the trial court verdict, [[App. Doc. No. 34]]. CSX's Petition for rehearing was denied on June 3, 2010. [[App. Doc. No. 41]].

2. That on June 30, 2010, prior to the issuance of the Mandate, CSX settled the Judgment and paid Plaintiff all monies due and owed. (See Exhibit A, attached hereto and incorporated herein by reference).

3. Defendant's check, attached hereto as Exhibit A, reflects the settlement in this matter. The check has been duly negotiated and received by Plaintiff.

4. That no further controversy exists between the parties.

5. Therefore, Plaintiff dismisses this action with prejudice.

Respectfully submitted,

KUJAWSKI & ASSOCIATES, P.C.

By: s/ Robert P. Marcus

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(618) 622-3600 – Telephone
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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing document has been electronically filed and therefore Notice of Electronic Filing service is being utilized, pursuant to Electronic Rule 8 this 16th day of July, 2010.

s/ Robert P. Marcus

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBERT MCBRIDE,	)	
Plaintiff,	)	
vs.	)	**No.: 3:06-cv-01017-JPG-CJP**
CSX TRANSPORTATION, INC.,	)	
Defendant.	)	

ORDER

For good cause, the Court hereby **ACKNOWLEDGES** Plaintiff's Notice of Settlement [Doc. 78]. Accordingly Plaintiff Robert McBride's claims against Defendant CSX Transportation, Inc. in this matter are hereby **DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED.

/s/

Judge J. Phil Gilbert
United States District Court

Subject:
From: "Bob Marcus" <bmarcus@kujawskiassociates.com>
Date: Mon, 11 Oct 2010 11:26:38 -0500
To: "'Michael Gross'" <mgross@grossbriefs.com>

– – – Original Message – – –
From: JPGpd@ilsd.uscourts.gov
To: Slatonx6@aol.com
Cc: cbauer@boylebrasher.com; jbax@boylebrasher.com
Sent: Mon, Jul 19, 2010 8:55 am
Subject: Re: McBride v. CSX Transportation, Inc., No. 3:06-cv-01017-JPG-CJP

All,

Per the Court's operating procedures, an order will not be entered concerning the recent notice of voluntary dismissal. The notice is self-effectuating, and the Clerk's office has been advised to close the file.

Please let me know if you have any questions/ concerns.

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REPLY BRIEF

No. 10-235

In the Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

ROBERT MCBRIDE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER[1]

As the petition explains, review is warranted because (1) FELA requires proof of proximate causation; (2) the lower courts are divided on the issue; (3) the question is a recurring one of great importance; and (4) this case is an ideal vehicle for deciding it, because a properly instructed jury readily could find that McBride's injury was not proximately caused by CSXT's negligence. McBride does not deny that a determination that FELA requires proximate cause would necessitate a new trial. He explicitly concedes that the issue "is a matter of exceptional importance." Opp. 37. He does not dispute that there is a conflict among the lower courts, contending only that the courts that disagree with the Seventh Circuit are mistaken. Opp. 25-26. And while he argues at length that FELA does not require proximate causation, Opp. 6-15, 28-37, his merits arguments are unpersuasive and, in any event, provide no reason to deny certiorari on an important question that has divided the lower courts in a case that squarely presents it. That leaves only McBride's transparent attempt to manufacture mootness. Opp. 4-6. The case is not moot, because, contrary to McBride's assertion, CSXT did not settle the case but merely paid the judgment, and a party does not forfeit the right to further review by doing so.

A. The Case Is Not Moot

After the Seventh Circuit issued its decision and denied rehearing en banc, CSXT moved that court to stay issuance of the mandate pending the filing and

[1] The Rule 29.6 Statement in the petition remains accurate.

disposition of a petition for certiorari. On June 24, 2010, the court denied the motion. *McBride* v. *CSX Transp., Inc.*, 611 F.3d 316 (7th Cir. 2010) (Ripple, J., in chambers). Six days later, CSXT paid the judgment. Opp. App. 3. As this Court has made clear in a "familiar line of cases," paying a judgment does not render a case moot, because "money paid involuntarily pursuant to a judgment can be recovered" if the judgment is reversed. *Graddick* v. *Newman*, 453 U.S. 928, 945 n.* (1981) (opinion of Rehnquist, J.); see, *e.g.*, *Cahill* v. *New York, New Haven & Hartford R.R.*, 351 U.S. 183, 184 (1956) (per curiam); *Dakota County* v. *Glidden*, 113 U.S. 222, 224 (1885).

McBride does not contend otherwise. He argues that the case is moot, not because CSXT paid the judgment, but because it "settled the case" and the "settlement *** ended the controversy *** and constituted a surrender of the railroad's right to further review." Opp. 5-6. But CSXT did not settle the case, and no reasonable person could believe that it did.

McBride's position depends on three words—"settlement of judgement"—handwritten on the check with which the judgment was paid. One of the meanings of "settlement," however, is "[p]ayment" or "satisfaction," BLACK'S LAW DICTIONARY 1497 (9th ed. 2009), and it manifestly has that meaning in this context.

McBride bears the burden of establishing mootness. *Cardinal Chem. Co.* v. *Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993). Yet he does not claim that the parties engaged in any post-judgment settlement discussions, entered into any settlement agreement, or compromised the judgment in any way. And for good reason, because they did not. Indeed, McBride concedes that CSXT paid "all of the money due him

under the judgment," Opp. 1, and so received nothing in return.[2] "A compromise and settlement requires an offer and acceptance[] [and] consideration," *Piver* v. *Pender County Bd. of Educ.*, 835 F.2d 1076, 1083 (4th Cir. 1987); all are lacking here. Beyond this, McBride omits to mention that CSXT had previously made clear its intent to file a petition for certiorari in moving to stay the mandate—which is obviously inconsistent with any intent to settle the case.

Under these circumstances, CSXT cannot have forfeited its right to file a petition for certiorari simply because, in paying the judgment in full, it issued a check on which its employee handwrote the notation "settlement of judgment" rather than "satisfaction of judgment." Cf. *United States* v. *Hougham*, 364 U.S. 310, 312-313 (1960) (finding it "wholly untenable," based on all the circumstances, that plaintiff-petitioner settled the case, and therefore mooted it, rather than having merely accepted payment of the judgment).

McBride does not contend that the notice of dismissal he filed in the district court, Opp. App. 4-5, independently renders the case moot. Nor could he, because a plaintiff may not dismiss a case unilaterally after the judgment has been entered and paid, see Fed. R. Civ. P. 41(a)—a prohibition that prevents "voluntary dismissals which unfairly affect the other side," *Paulucci* v. *City of Duluth*, 826 F.2d 780, 782 (8th Cir. 1987). Instead, a plaintiff's dismissal at this late stage requires either a "stipulation of dis-

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[2] The $293.91 discrepancy between the amount of the judgment ($184,250) and the amount of the payment ($183,956.09) is attributable to the addition of costs and interest and the deduction of the amount of a Railroad Retirement Board lien.

missal signed by all parties" or a "court order" following "the plaintiff's motion to dismiss." Fed. R. Civ. P. 41(a). There was no stipulation here, and McBride neither filed a motion nor obtained an order. See Dkt. in *McBride* v. *CSX Transp., Inc.*, No. 3:06-cv-01017 (S.D. Ill.).

This Court has an "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review." *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 288 (2000). For that reason, too, McBride's mischaracterization of the payment should be rejected, not rewarded with a denial of certiorari.

B. The Lower Courts Are Divided On Whether FELA Requires Proximate Causation

Six Circuits and two state courts of last resort have concluded that a FELA plaintiff need not prove proximate causation, while at least one Circuit and eight state courts of last resort have reached the opposite conclusion. See Pet. 23 & nn.5-6. Federal district courts and intermediate appellate courts are likewise divided on the question. See Pet. 24 & n.7. Pattern instructions also differ on the issue, as do instructions that have been given in particular cases. See Pet. 25; see also *Lowe* v. *CSX Transp., Inc.*, No. CT-000474-07 (Cir. Ct. Shelby County, Tenn. Oct. 7, 2010) (giving proximate-cause instruction that district court refused to give here).

Like the court of appeals, McBride quibbles with our description of which courts should go in which column. Opp. 15-27. The petition explains why our tally is correct. Pet. 27 n.8. But even if there is a basis for reasonable disagreement about precisely

how the lower courts are divided, ultimately McBride neither can nor does dispute that there is in fact a conflict.

Take *Raab* v. *Utah Railway*, 221 P.3d 219 (Utah 2009), for example. The Utah Supreme Court there held that FELA requires proximate cause, agreeing with the three-Justice concurrence in *Norfolk Southern Railway* v. *Sorrell*, 549 U.S. 158 (2007), and disagreeing with the Tenth Circuit, in which the State of Utah is located. Six months later, the Seventh Circuit decided this case. It provided an equally comprehensive treatment of the subject but reached the opposite conclusion, effectively agreeing with Justice Ginsburg's concurrence in *Sorrell*. McBride does not deny that there is a square conflict between *Raab* and the decision below. He simply argues that the decision below is correct and *Raab* erroneous—the latter reflecting, according to him, an "aberrant analysis" and "inappropriate repudiation of binding authority." Opp. 26.

Or take the Iowa Supreme Court's decision in *Snipes* v. *Chicago, Central & Pacific Railroad*, 484 N.W.2d 162, 164 (Iowa 1992), which concluded that FELA requires proof that the employer's negligence "proximately caused, in whole or in part," the employee's injury. McBride does not deny that, in light of the decision below, a railroad sued in state court in Iowa will be entitled to a proximate-cause instruction, while a railroad sued in federal court across the border in Illinois or Wisconsin will not. He asserts, instead, that *Snipes* wrongly relied on *Tennant* v. *Peoria & Pekin Union Railway*, 321 U.S. 29 (1944), which requires proximate causation, see Pet. 16-17, rather than on *Rogers* v. *Missouri Pacific Railroad*,

352 U.S. 500 (1957), which McBride understands to have abrogated it. Opp. 26.

A respondent's argument that the decision below is correct, while decisions of lower courts that reach the opposite conclusion are wrong, may be a basis for affirming the decision below at the merits stage, if the Court finds the argument persuasive. But it is not a reason to deny certiorari at the petition stage. Quite the contrary. See Sup. Ct. R. 10(a). Indeed, this Court's review is particularly warranted because McBride's merits arguments are *not* persuasive.

C. FELA Requires Proximate Causation

1. a. McBride does not dispute that FELA incorporates common-law principles unless it explicitly provides otherwise, and he does not deny that proximate cause is a bedrock principle of common-law negligence. He does contend, however, that FELA abrogates that principle. Without any citation of authority, and without any analysis of the text, McBride argues that "[t]he phrase 'in whole or in part'" in the Act "was designed to make it clear that negligence of an employer need not be either the sole *or the proximate cause* of injury in order for a worker to recover." Opp. 6-7 (emphasis added).

That is not correct. The phrase instead makes clear, as this Court has put it, that "there could be recovery against the railroad even if it were only partially negligent." *Sorrell*, 549 U.S. at 170. It authorizes recovery, in other words, when the railroad's negligence is *one of the causes* of the employee's injury—either the "whole" cause or a "part[ial]" cause. The language does not address the requisite *directness* of a cause, an issue that, under the established

methodology, is therefore governed by the common law.

Quoting *Coray* v. *Southern Pacific Co.*, 335 U.S. 520, 524 (1949), McBride claims that CSXT's reading of "in whole or in part" introduces unwarranted "dialectical subtleties" into the Act. Opp. 7. But *Coray* is a curious choice of authority, inasmuch as it permitted recovery when defective equipment was "the sole or a contributory *proximate cause*" of the employee's death. *Coray*, 335 U.S. at 523 (emphasis added). That is the standard that CSXT advocates.

McBride also asserts that CSXT's interpretation somehow "disable[s]" the statutory phrase "in whole or in part" in certain cases. Opp. 33. To the contrary, the disjunctive language simply makes clear that an employee may recover whenever a jury finds *either* that the railroad's negligence was the sole cause of the injury ("in whole") *or* that it was one of multiple causes of the injury ("in part"). The language hardly compels the conclusion that FELA abrogates proximate causation. If it did, *Tennant* would not have said that the railroad's negligence must be the "proximate cause in whole or in part" of the employee's injury. 321 U.S. at 32.

b. McBride's principal argument is based, not on FELA's text, but on its post-enactment legislative history. He contends that the rejection, in the late 1930s, of an amendment that would have used the term "proximate cause" shows that Congress did not intend proximate cause to be the standard. Opp. 6-7, 33-34. But "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation," because "several equally tenable inferences may be drawn from [congressional] inaction, includ-

ing the inference that the existing legislation already incorporated the offered change." *United States* v. *Craft*, 535 U.S. 274, 287 (2002) (internal quotation marks omitted). That inference is warranted here. Because this Court had consistently interpreted FELA to require proximate cause, see Pet. 16-17 & n.3, the most likely explanation for Congress's decision not to use the term "proximate cause" in the final bill is that it was unnecessary. Indeed, a union representative testified that the language would be "pure surplusage, because unless the negligence proximately caused the injury there can be no recovery." *Hearings on H.R. 4988 and H.R. 4989 Before the H. Comm. on the Judiciary*, 76th Cong. 5 (1939) (statement of general counsel of Brotherhood of Railroad Trainmen).

Insofar as any legislative history bears upon the question, it shows that the Congress that enacted FELA intended it to abrogate the common law in only "four *** particulars." S. Rep. No. 60-460, at 1 (1908); accord H.R. Rep. No. 60-1386, at 1 (1908). None has anything to do with proximate causation. See Pet. 15.

c. McBride also contends that FELA cannot require proximate causation because "Congress intended [the Act] to be given the liberal interpretation commonly afforded remedial legislation." Opp. 36. But the very same theory was advanced in *Sorrell*, and the Court was "not persuaded." 549 U.S. at 171.

While acknowledging that FELA "was indeed enacted to benefit railroad employees"—"as the express abrogation of [certain] common-law defenses *** make[s] clear"—the Court explained that it nevertheless "does not follow *** that this remedial pur-

pose requires [the Court] to interpret every uncertainty in the Act in favor of employees." *Sorrell*, 549 U.S. at 171. The Court went on to say that "FELA's text does not support the proposition that Congress meant to take the unusual step of applying different causation standards" to the plaintiff and the defendant and that "the statute's remedial purpose cannot compensate for the lack of a statutory basis." *Ibid.* The Court therefore held that "FELA does not abrogate the common-law approach." *Ibid.* So too here.

2. a. Like the lower-court decisions with which he agrees, McBride places heavy reliance on *Rogers*. Opp. 9-10. But he does not deny that, before *Rogers*, this Court repeatedly held that FELA requires proof of proximate causation, see Pet. 16-17 & n.3, and he does not challenge our characterization of those decisions. His only response is that they "are of no relevance," because "*Rogers* made it clear that such cases could not have been correct." Opp. 10 n.1. McBride's position thus reduces to the claim that *Rogers* not only overruled at least 15 of this Court's decisions, but overruled them without saying (or even suggesting) that it was doing so—and, indeed, that it overruled the decisions even as it was citing a number of them with approval, see Pet. 20.

Such an understanding of *Rogers* is highly implausible, to put it mildly. An overruling by implication, like a repeal by implication, is disfavored. That is especially true when, as in this case, the precedent is long-settled, has been repeatedly reaffirmed, and involves an issue of statutory interpretation, where, as McBride himself acknowledges, Opp. 28-29, *stare decisis* considerations are strongest. See, *e.g.*, *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 32 (2005). If at all possible, therefore, *Rogers* must be interpreted in a man-

ner consistent with this Court's prior decisions. *Cf. Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 98 (1998) (finding it "clear" that a decision "was not meant to overrule, *sub silentio*, two centuries of jurisprudence"). As three Justices explained in *Sorrell*, an interpretation of *Rogers* that is consistent with the Court's prior decisions on proximate causation is not only possible but correct. See Pet. 18-21.

McBride disagrees. According to him, *Rogers* "held *** that the proximate cause standard was not the correct test for employer liability under the FELA." Opp. 10. But the language in *Rogers* on which he relies is that "the test of a jury case" is "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury." *Ibid.* (quoting *Rogers*, 352 U.S. at 506). That language concerns multiple—not proximate—causation, see *Sorrell*, 549 U.S. at 175 (Souter, J., concurring), a fact confirmed by the sentence that immediately follows (and that McBride omits): "It does not matter that *** the jury may also *** attribute the result to *other causes*, including the employee's contributory negligence." *Rogers*, 352 U.S. at 506 (emphasis added).

b. McBride also contends that this Court has "reaffirmed" post-*Rogers* that "proximate cause is not appropriate under FELA." Opp. 10. But the cases on which he relies, Opp. 10-15, are entirely consistent with the long line of decisions recognizing and applying the requirement of proximate cause.

Most of the cases did not involve causation at all. *Sinkler* v. *Missouri Pacific Railroad*, 356 U.S. 326 (1958), decided whether a contractor was an "agent" of the railroad under FELA. *Crane* v. *Cedar Rapids & Iowa City Railway*, 395 U.S. 164 (1969), deter-

mined whether a State could make the defense of contributory negligence available to a railroad sued by a non-employee under the common law. *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994), addressed the proper standard for negligent infliction of emotional distress. And *Norfolk & Western Railway* v. *Ayers*, 538 U.S. 135 (2003), considered whether FELA permits recovery for a fear of cancer and authorizes joint and several liability.

The two other cases cited by McBride did involve causation, but they held only that there was sufficient evidence that the railroad's negligence was a cause of the employee's injury. See *Gallick* v. *Baltimore & Ohio R.R.*, 372 U.S. 108, 113-117 (1963); *Dennis* v. *Denver & Rio Grande W. R.R.*, 375 U.S. 208, 210 (1963) (per curiam). Neither decision called into question the requirement that the cause be a proximate one. Indeed, in both cases—as in *Rogers*—the jury was instructed that it must be. See *Gallick*, 372 U.S. at 111; *Dennis*, 375 U.S. at 211 n.* (Douglas, J., dissenting).

In discussing *Crane* and *Gottshall*, McBride highlights their dicta on causation. Opp. 11-12. But the dicta are consistent with the proper understanding of *Rogers*—*i.e.*, that FELA rejects any requirement of *sole* proximate causation. See Pet. 21-22. McBride also argues that the dicta are entitled to *stare decisis* respect. Opp. 12-13. But that is obviously not true; "a formula repeated in dictum but never the basis for judgment is not owed *stare decisis* weight." *Gonzalez* v. *United States*, 553 U.S. 242, 256 (2008). In any event, any conflict between pre-*Rogers* holdings and post-*Rogers* dicta is a reason to grant certiorari, not to deny it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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No. 10-235

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Petitioner,

v.

ROBERT MCBRIDE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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ROBERT MCBRIDE,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b), the Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. Petitioner has consented to AAR's filing of a brief.[1] In accordance with Rule 37.2(a), AAR has provided notice to counsel for Respondent of AAR's intent to file a brief. Respondent has not consented.

[1] The letter expressing consent has been filed with the Clerk of the Court.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry, including participation as *amicus curiae* in cases raising significant legal and policy issues.

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, presents such an issue. FELA, a federal negligence statute, takes the place of workers' compensation in the railroad industry. FELA presents unique issues and problems for railroads because, as a negligence law, it differs fundamentally from the no-fault compensation systems that cover virtually all other U.S. industries. Each year thousands of FELA claims and lawsuits, like the case below, are asserted against AAR member railroads, to which they devote substantial legal and financial resources: all told, the railroads spend three quarters of a billion dollars annually in the payment and defense of claims brought under FELA. Because FELA litigation is an ongoing event for all major railroads, AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability under FELA.

Echoing prior decisions of some other lower state and federal courts, the court below erroneously sanctioned the application of a relaxed standard of causation in FELA cases, a ruling that is at odds with the plain language of the statute, Congressional intent and prior decisions of this Court and other courts.

This issue is relevant in virtually every FELA lawsuit, and numerous lower court decisions demonstrate that the way in which causation is interpreted can affect the outcome of a case.

When AAR participates as *amicus curiae* in a FELA case, it brings a broad, industry-wide perspective to the issues before the court. AAR works closely with its member railroads on a host of issues arising under FELA. Thus, AAR is thoroughly familiar with the trends and key issues that confront its members in FELA litigation. In its brief, AAR will urge this Court to grant certiorari in order to finally clarify the proper standard of causation in FELA cases, emphasizing that how the lower courts interpret this issue can have a decisive impact in FELA cases. As a trade association representing the nation's major railroads, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

Respectfully submitted,

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IN THE

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The interest of *amicus curiae* Association of American Railroads (AAR) is set forth in the Motion for Leave to File a Brief which is filed along with this brief.

[1] Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

STATEMENT OF THE CASE

AAR adopts the Statement of the Case of Petitioner.

SUMMARY OF THE ARGUMENT

This Court should grant the petition in order to provide guidance on a fundamental issue arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, that has been the source of confusion and lack of uniformity for many years: the standard of causation. Time and again, in providing jury instructions, ruling on dispositive motions, and in reviewing such matters on appeal, some lower courts have held that a more "relaxed" burden applies to plaintiffs in proving causation in FELA cases than would in an ordinary common law action. Many of those decisions demonstrate that how courts interpret causation can have a significant impact on the outcome of a case. In contrast, other courts hold that FELA plaintiffs must show proximate cause. Only clarification of the proper standard of causation by this Court will end the intolerable lack of uniformity on this fundamental issue.

The language and legislative history of the statute, and early decisions of this Court, show that Congress did not intend to modify the common law standard of causation when it enacted FELA in 1908. Congress expressly modified some of the prevailing common law defenses that made recovery more difficult, including the traditional contributory negligence doctrine, but these modifications did not address the causation standard. Consequently, in the years following FELA's enactment this Court consistently held that plaintiffs had to prove their injuries were proximately caused by the defendant's negligence.

Neither subsequent amendments to FELA, nor this Court's decision in *Rogers v. Missouri Pac. R.R.*, offers support for lower court decisions that hold otherwise.

ARGUMENT

THIS COURT SHOULD GRANT THE PETITION AND CLARIFY THE PROPER STANDARD OF CAUSATION UNDER FELA BECAUSE IT IS A FUNDAMENTAL ISSUE ARISING UNDER THE STATUTE WHICH CONTINUES TO BE THE SUBJECT OF CONFUSION AND LACK OF UNIFORMITY IN THE LOWER COURTS

The rights and obligations under FELA depend upon the concepts of common law negligence. *Urie v. Thompson*, 337 U.S. 163, 182 (1949); *Southern Ry. v. Gray*, 241 U.S. 333, 339 (1916). And, except as Congress has explicitly altered those common law concepts, they are entitled to great weight in interpreting FELA. *Norfolk Southern Ry. Co. v. Sorrell*, 459 U.S. 158, 168 (2007); *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543-44 (1994). Nonetheless, despite acknowledging that "[e]arly FELA cases did not interpret [FELA] as altering the common-law requirement of proximate cause" and that "[t]hese early cases never have been overruled explicitly," *McBride v. CSX Transp., Inc.*, 598 F.3d 388, 392-93 (7th 2010), the Seventh Circuit "decline[d] to hold that . . . common law proximate causation is required to establish liability under the FELA." *Id.* at 406. Instead, the Seventh Circuit opined that the concept of proximate cause has "broadened" over "FELA's history," and that a "new conception of proximate cause 'crystallized' in *Rogers* [*v. Missouri Pac. R.R.*, 352 U.S. 500 (1957)]." *Id.* at 395. In reaching this

conclusion, the Court seemed swayed not so much by *Rogers* itself, but rather, by the interpretation given *Rogers* by many, but by no means all, lower courts that have addressed the issue of causation under FELA during the last half century.[2]

During the first fifty years following FELA's enactment causation was a straightforward and non-controversial issue. Since *Rogers*, it has become muddled and confused. Commenting on the disarray that already existed a decade after *Rogers* was decided, the California Court of Appeal observed that "[i]t is almost impossible to frame a definition of causation for F.E.L.A. cases . . . because the federal decisions cannot themselves be fully harmonized on the subject." *Parker v. Atchison, Topeka & Santa Fe Ry. Co.*, 263 Cal.App.2d 675, 678, 70 Cal. Rptr. 8, 10 (Cal. App. 1968). As the Petition describes, this confusion and lack of uniformity has only increased, to the point where there presently is a serious split of authority in the lower federal and state courts on the standard of causation that applies in FELA cases. [Pet. at 22-25] Because the Seventh Circuit issued a comprehensive opinion, in which the causation issue was squarely presented, this case presents an excellent opportunity for this Court to answer the question left unresolved in *Sorrell*, and provide much needed

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[2] The Seventh Circuit agreed with Justice Souter's concurring opinion in *Sorrell*, that *Rogers* "was a case that involved multiple causes," and, in particular, the "issue of when a case with multiple causes must be submitted to a jury," 598 F.3d at 404, but noted, as a countervailing point, that the majority of Federal Courts of Appeals hold that proximate cause does not apply in FELA cases. *Id.* at 399-400. However, as petitioner points out, eight state courts of last resort hold that proximate cause is required. Pet. at 23.

clear and definitive guidance on the proper standard of causation under FELA.

A. The Erroneous Interpretation of FELA's Causation Standard by the Court Below and Other Lower Courts Has Had and Will Continue to Have a Substantial and Decisive Impact on the Outcome of FELA Cases

The question presented in the petition raises an issue of great importance. The split among lower courts over the proper standard of causation under FELA is far more than a question of semantics or a matter of courts using different labels to apply the same substantive standard. As numerous cases demonstrate, the standard for showing causation utilized by a court, whether reflected in jury instructions, rulings on dispositive motions, or appellate review, frequently affects the outcome of FELA cases.

The Fifth Circuit's opinion in *Armstrong v. Kansas City Southern Ry. Co.*, 752 F.2d 1110 (5th Cir. 1985), is one of the most compelling examples of how the standard of causation can be outcome determinative. In *Armstrong*, the railroad had hired a local cab company to transport the plaintiff from the point where he disembarked from a train late at night to the railroad's yard offices. In route, the driver stopped the cab on the road without turning on the emergency flashers. The cab was hit from the rear by another motorist, injuring the plaintiff. Asserting that the "common-law proximate cause standard is modified and the employee has a less demanding burden of proving causal relationship," *id.* at 1113, the Court affirmed the jury's verdict finding the railroad liable, allowing the jury a wide berth to make inferences supporting its verdict.

The case also involved a state law indemnity action by the railroad against the cab company, its agent.[3] Under the very same set of facts, the Court of Appeals affirmed the denial of the railroad's claim, upholding the lower court's finding that the cab driver was not negligent. The Court held that "even though the jury found that [defendant] was liable to Armstrong [in the FELA action] because of the negligent conduct of its agent, the district court was neither constrained nor required to find the negligence of [the cab company] proximately caused Armstrong's injury." *Id.* at 1115. The Court explained that the railroad's "argument ignores the different causation standards of the two actions . . . The standards of liability for negligence under §1 of [FELA] are significantly broader than in ordinary common-law negligence actions." *Id.* Thus, the very conduct that gave rise to liability in the FELA action did not support liability in the indemnity action, an outcome directly attributable to the Court's ruling that a different, "significantly broader" standard of causation applies under FELA. *Id.*[4]

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[3] In *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003), this Court held that while joint and several liability applies to FELA, railroads have the right to bring indemnity and contribution actions against third parties under applicable state or federal law. *Id.* at 162.

[4] Not only does the *Armstrong* decision demonstrate starkly how applying a relaxed causation standard can affect the outcome of a case, it highlights the inherent unfairness of such a rule. *Ayers* suggests that the impact of holding railroads jointly liable for the negligence of other tortfeasors is mitigated by the railroads' right to seek indemnity under state law. However, the fairness of this balance is undermined if railroads must defend against a relaxed standard of causation as FELA defendants, but must prove proximate cause as indemnity plaintiffs.

Other examples of the impact of FELA's purported "relaxed" causation standard abound. In *Davis v. CSX Transp.*, Inc., 2005 WL 1935676, at *1 (W.D. Ky. 2005), the Court explained that the "burden of proof of causation under FELA is relaxed compared to ordinary negligence actions" and therefore the plaintiff "need offer little more than a scintilla of evidence that the employer's negligence played any part in the plaintiff's injury." As a result, the Court dispensed with the need for the plaintiff to offer evidence connecting the alleged negligent conduct (allowing pools of grease to accumulate in the yard) to her injury (losing her footing and falling off a boxcar sill step), and denied the railroad's motion for summary judgment. *Id.* at *2.

In *Koller v. Burlington Northern Santa Fe Ry. Co.*, No. Civ. S-01-914 GGH (E.D. Calif. 2002), the plaintiff brought a FELA action based on his employer's failure to prevent an assault by a third party. The Court evaluated the railroad's motion for summary judgment under the premise that "[i]n a FELA case, the causation standard is relaxed" and "the jury's power to engage in inferences is significantly broader than in common law negligence actions." Slip op. at 4. Examining the evidence in the context of these legal conclusions, the court denied the railroad's motion "given the weakened causation standard in FELA cases." *Id.* at 7.

Even in the rare instance where a trial court grants a defendant's dispositive motion in a FELA case, such rulings typically do not survive appellate review in courts applying a relaxed standard of causation. For example, in *Booth v. CSX Transp., Inc.*, 211 S.W.3d 81, 85 (Ky. App. 2006), the trial court granted summary judgment for the railroad,

finding that "it does not appear that the testimony of either of Plaintiff's physicians provides the necessary testimony stated within a reasonable degree of medical probability to establish causation on the part of CSX." However, the Kentucky Court of Appeals reversed, expressing its view that "Congress intended FELA to be a departure from common law principles of liability . . ." and that "plaintiffs have a lower standard of proof than plaintiffs in ordinary negligence cases." *Id.* at 83-84.

The significance of the causation standard applied was recently underscored by a district court which, referring to FELA's purported "relaxed standard for proving causation," explained that while the plaintiff's "first claim might not survive a motion for summary judgment in the traditional tort context, the low negligence threshold of FELA ensures that this count will live to see another day." *Gibbs v. Union Pac. R.R.*, 2009 WL 3064956, at *4 (S.D. Ill. 2009). Similarly, a federal court in Louisiana summarized the judicial attitude about FELA cases when it found that "FELA plaintiffs can survive dispositive motions by offering evidence which would be insufficient to overcome a similar motion in an ordinary civil case." *Kansas City Southern Ry. Co. v. Nichols Construction Co.*, 574 F.Supp.2d 590, 594 (E.D. La. 2008).

B. Although Prior Rulings of this Court Supporting Proximate Cause Have Never Been Overruled or Questioned the Court Below and Some Other Lower Courts Erroneously Believe That This Court's Decision in *Rogers* Broadened FELA's Causation Standard

Only a definitive ruling by this Court will resolve this important issue as it is clear that many lower courts read *Rogers* as mandating a substantive change in how the issue of causation is analyzed in FELA cases. For example, in *Richards v. Consolidated Rail Corp.*, 330 F.3d 428 (6th Cir. 2003), the plaintiff was the conductor on a train which had stopped as a result of an unexpected application of the air brake system. He was injured when he lost his footing and slipped on ballast while walking alongside the train to inspect it. Plaintiff's theory was that the train stop was caused by a defective valve, and but for that defect he would not have been walking the train at that time. It was not alleged that any negligence by the railroad directly caused him to slip.

The District Court granted summary judgment for the railroad on the grounds that the plaintiff "could not demonstrate that his injury was causally linked to the allegedly defective appliance." *Id.* at 431. Rather, the court found that the "injury merely was an incidental condition of the defect," concluding that plaintiff's "slip and injury bears too tenuous a connection with the defective appliance so as to give rise to liability." *Id.* The Sixth Circuit reversed, holding that *Rogers* "announced a relaxed test for establishing causation in FELA cases," *id.* at 433, and rejecting the prior Sixth Circuit decision in *Reetz v.*

Chicago & Erie R.R., 46 F.2d 50 (6th Cir. 1931), as "no longer good law in light of *Rogers*." *Id.* at 437. *Richards* provides yet another example of how a court's reading of *Rogers* can change the outcome of a FELA case.

The District Court's analysis of causation in *Richards* had not only followed prior circuit precedent, it also was faithful to this Court's analysis of causation in *Davis v. Wolfe*, 263 U.S. 239 (1923). In *Davis*, this Court directly addressed the standard of causation in FELA cases, explaining that "on the one hand, an employee cannot recover" if the employer's negligence or failure to comply with a safety statute

> is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him . . .

263 U.S. at 243.

The Second Circuit's decision in *Zimmerman v. Long Island R.R.*, 2 Fed. Appx. 172 (2d Cir. 2001), provides an example of how a "but for" causation standard has replaced the concepts articulated in *Davis*. In *Zimmerman*, the plaintiff tripped and injured himself while returning from a job he had been assigned to do on his own. He claimed that in assigning him to his job, and in training its employees, the railroad had violated a federal regulation, the Roadway Worker Protection Rule (RWPR). Even though there was no apparent connection

between the alleged violation of the RWPR and the plaintiff's accident, the Court held that there was sufficient evidence of causation under FELA's "relaxed" standard to support the jury's verdict for the plaintiff. The Court explained that inasmuch as a FELA "plaintiff is 'not required to prove common law proximate causation,'" the jury could have concluded that had the plaintiff's supervisor "been aware that the plaintiff was not qualified as a lone worker, the plaintiff would presumably not have been dispatched on the night of" the accident. *Id.* at 175-76.

Although *Davis* and other precedent of this Court applying proximate cause in FELA cases have never been overruled, the Second and Sixth Circuits, like the Court below, believe that *Rogers* changed the standard of causation under FELA to permit plaintiffs to prevail by showing only a tenuous connection between alleged railroad negligence and their injury.

Indeed, some federal courts of appeals, which previously had understood FELA to incorporate proximate cause, came to the conclusion that *Rogers* required them to repudiate their previous holdings. *Compare Anderson v. Baltimore & Ohio R.R.*, 89 F.2d 629, 630 (2d Cir. 1937) (the issue is whether the defect "was the proximate cause of [plaintiff's] death") *with Nicholson v. Erie R.R.*, 253 F.2d 939, 940 (2d Cir. 1958) ("[T]o impose liability on the defendant, the negligence need not be the proximate cause of the injury."); *Larsen v. Chicago & Northwestern Ry. Co.*, 171 F.2d 841, 844 (7th Cir. 1949) ("To recover under [FELA] plaintiff must prove that the defendant was negligent and that such negligence in whole or in part was the proximate cause of his injuries.") *with* the decision below, "declin[ing] to hold that . . . common law proximate causation is required

to establish liability under the FELA." 598 F.3d at 406. The Tenth Circuit summarized this judicial attitude, explaining that "[d]uring the first half of this century, it was customary for courts to analyze liability under the FELA in terms of proximate causation," but that *Rogers* "definitively abandoned this approach." *Summers v. Missouri Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997).

C. Neither the Statute Nor Legislative History Supports the Lower Court's Holding that a Relaxed Standard of Causation Applies in FELA Cases

The purported abandonment of proximate cause erroneously ascribed to *Rogers* has moved FELA closer to a no-fault compensation system in many jurisdictions. As the Seventh Circuit candidly explained in an earlier case:

> Having accorded the customary . . . deference to the non-insurer aspect of the FELA defendant we will now proceed to discuss the statute as it is. Before doing so, we observe that while FELA in its terms does not purport to border on a workman's compensation act, certain parallelisms may be found.

Heater v. Chesapeake & Ohio Ry. Co., 497 F.2d 1243, 1246 (7th Cir. 1974). This has occurred in large part as a result of the abandonment of proximate causation, which, as the cases cited above demonstrate, has made a finding of employer liability far more likely. *E.g., Williams v. Long Island R.R. Co.*, 196 F.3d 402, 406 (2d Cir. 1999) ("with respect to causation, a relaxed standard applies in FELA cases"); *Oglesby v. Southern Pac. Transp. Co.*, 6 F.3d 603, 607 (9th Cir. 1993) (*Rogers* "has been read to indicate that common

law 'proximate cause' is not required under the FELA.")[5] Notwithstanding these holdings, there is no evidence whatsoever that in 1908 when Congress enacted a federal negligence statute to compensate rail workers injured on the job it intended to eliminate proximate cause.

Congress enacted FELA in response to what was perceived as an intolerably high injury rate in the railroad industry.[6] At that time, the concept of no-fault workers' compensation—today the predominant method of compensating workplace injuries—had not yet gained a foothold in the United States. Therefore, Congress adopted what was then the universal compensation model in the United States: the law of negligence. The policy embodied in FELA was

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[5] Indeed, some courts have placed an extremely light burden on FELA plaintiffs in holding their employers liable for workplace injuries. *See Harbin v. Burlington Northern Ry. Co.*, 921 F.2d 129, 132 (7th Cir. 1990) (explaining that to sustain a jury verdict in a FELA case requires "evidence scarcely more substantial than pigeon bone broth"); *Rivera v. Union Pac. R.R.*, 378 F.3d 502, 506 (5th Cir. 2004) (calling the plaintiff's burden of proof "featherweight"). Recently, a district court in Indiana agreed with the defendant that "the causation evidence in the record as it stands is tenuous" but nonetheless denied the defendant's motion for summary judgment "in light of the featherweight standard of proof required" under FELA. *Grogg v. CSX Transp., Inc.*, 659 F.Supp.2d 998, 1005 (N.D. Ind. 2009).

[6] In the year ending June 30, 1907, 4,534 rail workers were killed on the job and 87,644 were injured. Interstate Commerce Commission, Statistics of Railways in the United States 1908, 41, 99 (1909). On several occasions at the end of the previous century, President Harrison had admonished Congress to act to protect rail employees, a plea which resulted in enactment of the Safety Appliances Act, c. 196, 27 Stat. 531 (1893), the first federal railroad safety legislation. *See Johnson v. Southern Pac. Co.*, 196 U.S. 1, 19 (1904).

straightforward: railroads were to be liable in damages for injuries sustained by their employees in the course of their railroad employment when such injuries were caused by the negligence of the railroad. 45 U.S.C. §51.

When Congress enacted FELA, it made express changes to some of the harsher aspects of nineteenth century common law which often erected insurmountable barriers to recovery by workers sustaining job-related injuries.[7] Accordingly, contemporaneous with the statute's enactment, the Senate reported that FELA "revises the law as now administered in the courts in the United States in four important particulars." S. Rep. No. 460, at 1 (1908). Specifically, the Senate Report described these revisions to the common law as addressing the fellow servant doctrine, assumption of the risk, contributory negligence, and prohibiting contracts that relieve the employer of liability. *Id.* at 1-3. There was no suggestion that the common law standard of causation was being modified. The House of Representatives offered an identical list when it described how FELA "change[d] the common-law liability of employers," H.R Rep. No. 1386, at 1 (1908), noting in addition, that the FELA "makes each party responsible for his

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[7] For example, recovery was denied if the worker knew the inherent dangers of a job and assumed those risks by accepting employment. *E.g.*, *Clark v. St. Paul & Sioux City R.R.*, 9 N.W. 581 (Minn. 1881); *Gibson v. Erie Ry. Co.*, 63 N.Y. 449 (1875). The fellow servant rule, a variant of the assumption of the risk doctrine, held that among the ordinary risks of employment the employee takes upon himself is the "carelessness and negligence of those who are in the same employment," on the theory that "these are perils which the servant is as likely to know, and against which he can as effectually guard, as the master." *Farwell v. Boston & Worcester R.R.*, 4 Metc. 49, 57 (Mass. 1842).

own negligence and requires each to bear the burden thereof," *id.*, hardly language that suggests an intent to subject FELA plaintiffs to a "featherweight" burden when proving one of the essential elements of their cause of action.[8]

Similarly, this Court's understanding of the revisions of common law made by FELA did not include any modification to the standard of causation. Shortly after its enactment, the constitutionality of FELA was challenged. Among other arguments advanced by those challenging the statute was that in modifying the common law Congress exceeded its authority to regulate interstate commerce. In addressing this challenge, which it rejected, this Court described those modifications as including (1) the abrogation of the fellow servant rule; (2) the replacement of the contributory negligence rule with a scheme of comparative negligence; (3) the abrogation of the assumption of the risk doctrine where a violation of a safety statute caused the injury; and (4) the right of a personal representative to seek damages for the death of an employee for the benefit of designated relatives. *Mondou v. N.Y., N. H. & Hartford R.R.*, 223 U.S. 1, 49-50 (1912). Absent, however, is any mention of the standard of causation. Accordingly, the decisions of this Court in the first few decades after FELA's enactment—decisions the Court below acknowledged have never been overruled—clearly articulated a traditional standard of causation that cannot be squared with the so-

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[8] As in any negligence action, causation is a fundamental issue in litigation arising under FELA. *See e.g., Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539 (6th Cir. 1990) (a FELA plaintiff must "prove the traditional common law elements of negligence: duty, breach, foreseeability, and causation").

called "relaxed" standard that some lower courts apply today. *E.g., Davis v. Wolfe supra; see also, Lang v. N.Y. Cent. R.R.*, 255 U.S. 455, 461 (1921); *St. Louis-S.F. Ry. v. Mills*, 271 U.S. 344, 347 (1926); *Northwestern Pac. R.R. v. Bobo*, 290 U.S. 499, 503 (1934).

Because Congress has made no change to the relevant language of FELA since 1908, there simply is no basis to support the assertion that the concept of proximate cause has broadened over the years since FELA was enacted. Important amendments to FELA were enacted in 1939, and some courts have asserted that *Rogers'* purported introduction of a relaxed causation standard was to conform to those amendments. *E.g., Richards*, 330 F.3d at 434; *Morrison v. N.Y. Cent. R.R.*, 361 F.2d 319, 320 (6th Cir. 1966). However, review of those amendments gives lie to that rationale.

Rogers does briefly reference the 1939 amendments, 352 U.S. at 509-10, but never suggests that they required a reexamination of the causation standard under FELA, for the simple reason that they did not. The 1939 amendments were primarily intended to ease the path toward recovery by FELA plaintiffs by modifying aspects of the statute that had served to prevent injured employees from recovering, either because they could not meet the strict test of interstate commerce[9] or because the employer successfully argued that the employee had assumed the risks inherent in the employment. However, the

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[9] In order to recover, "the employee, at the time of the injury," had to be "engaged in interstate transportation, or in work so closely related to it as to be practically a part of it." *Shanks v. Delaware, Lackawanna & Western R.R.*, 239 U.S. 556, 558 (1916).

1939 amendments did not purport to address, let alone modify, the standard of causation.

Adding a provision to section 1 of FELA, the 1939 amendments expanded the scope of FELA's coverage so that workers would no longer have to prove they were engaged directly in interstate commerce at the time they were injured in order to come within the scope of FELA's coverage. Act of Aug. 11, 1939, c. 685, §1, 53 Stat. 1404; *see* S. Rep. No. 661, at 2-3 (1939); *see Southern Pac. Co. v. Gileo*, 351 U.S. 493 (1956); *Reed v. Pennsylvania R.R.*, 351 U.S. 502 (1956). In addition, in 1939, Congress amended FELA to eliminate the defense of assumption of the risk in all cases. Act of Aug. 11, 1939, at §1. The 1939 amendments also increased the statute of limitations under FELA from two to three years, *id.* at §2, and prohibited railroads from establishing and enforcing rules which penalized employees for giving information concerning an accident to the injured person or his representative. *Id.* at §3. Thus, the 1939 amendments provide no basis for incorporating into FELA a standard of causation that differs from what Congress intended in 1908. Indeed, a few years after enactment of the 1939 amendments, this Court described the "proximate cause" standard applicable in FELA cases as requiring a finding "that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances," adding that "[e]vents too remote to require reasonable prevision need not be anticipated." *Brady v. Southern Ry. Co.*, 320 U.S. 476, 483 (1943).

D. While the Reasoning of This Court's *Sorrell* Decision Appears to Support a Proximate Causation Standard, Uncertainty Continues in the Lower Courts That Can be Resolved Only By a Definitive Ruling By This Court

Rather than repudiate *Brady* and dozens of other prior decisions, as the Petition explains, quoting Justice Souter, *Rogers* is "'no authority for anything less than proximate cause in an action under FELA.' *Sorrell*, 549 U.S. at 177." [Pet. at 20] In *Sorrell*, this Court held that the causation standard for employee contributory negligence was equivalent to the standard for employer negligence, 549 U.S. at 171, but did not specifically identify the proper standard of causation. While this Court's analysis in *Sorrell* suggests support for its earlier decisions in *Davis* and *Brady*—that Congress intended to incorporate common law proximate cause into FELA—*Sorrell* appears to have led to greater uncertainty in the lower courts.

This Court based its *Sorrell* decision in part on the fact that under common law the same standard of causation applied to both employer and employee negligence, which, it explained, was "strong evidence against Missouri's disparate standards." *Id.* at 168. Thus, *Sorrell* was grounded in the well established rule that except where Congress expressly altered the common law, FELA is to be interpreted in accordance with common law principles. *Gottshall*, 512 U.S. at 544; *Metro-North Comm. R.R. v. Buckley*, 521 U.S. 424, 429 (1997). As with the principle of equivalence of standards, proximate cause also was the common law rule when FELA was enacted. It would be curious indeed to hold that Congress adopted the

common law rule of equivalence, but at the same time rejected the equally entrenched common law rule of proximate cause. Certainly, there is no statutory basis for such a conclusion.

In *Sorrell*, the plaintiff argued that use of the term "in whole or in part," in section 1 of FELA, but not in section 3, signaled that each section incorporated a different standard of causation, with section 1, which addresses employer negligence, calling for a more relaxed standard. *See* 45 U.S.C. §§51, 53. This Court rejected that argument. *Sorrell* instead confirmed that the "in whole or in part" language—the alleged statutory basis for the elimination of proximate cause—simply is descriptive of FELA's comparative negligence standard, under which the employer's negligence need not be the sole cause of an injury for the employer to be liable for damages (albeit damages reduced to the extent the employee's negligence also contributes to the injury). 549 U.S. at 170-71. Indeed, the Court below acknowledged that had *Sorrell* "reached the substantive issue, at least some members of the majority may have been sympathetic to Justice Souter's view." 598 F.3d at 405.

Notwithstanding the reasoning of *Sorrell*, and Justice Souter's concurring opinion, critiquing with "considerable force" the cases suggesting that FELA has abolished proximate cause, *id.* at 404, it is clear that uncertainty over the proper standard of causation will continue among lower courts. *See e.g.*, *Mills v. CSX Transp., Inc.* 2009 WL 4547685, at *5, n. 4 (Tenn. 2009) ("It is not entirely clear which standard of causation *Rogers* applies to FELA cases—the common law standard or a relaxed standard."); *Montgomery v. CSX Transp., Inc.*, 656 S.E.2d 20, 27 (S.C. 2008) ("[T]he *Sorrell* Court did not establish

precisely what the FELA standard for causation is."); *Hall v. Norfolk Southern Ry. Co.*, 2007 WL 2765540, at *6, n.2 (N.D.Ga. 2007) ("With respect for [sic] a standard of causation, the Supreme Court continues to debate the precise contours of its holding in *Rogers*.") Echoing this confusion, the Kentucky Supreme Court recently observed that "[t]he [U.S.] Supreme Court has yet to state clearly whether *Coray*, *Carter*, and *Rogers* altered the common-law proximate cause standard." *CSX Transp., Inc. v. Begley*, 313 S.W.3d 52, 62 (Ky. 2010).

Though *Sorrell* has ignited debate over the meaning of *Rogers*, and the proper standard of causation under FELA, like the court below, some lower courts erroneously continue to view *Rogers* as precedent for the abandonment of proximate cause in FELA cases. *E.g.*, *Medwig v. Long Island R.R.*, 2007 WL 1659201, at *3-*4 (S.D.N.Y. 2007) (adhering to Second Circuit precedent interpreting *Rogers* as countenancing a relaxed standard of both causation and negligence in FELA cases, finding that *Sorrell* did not overrule that precedent). Others do not. *See Raab v. Utah Ry.*, 221 P.3d 219, 288-29 (Utah 2009) (notion that *Rogers* "'definitively abandoned' the requirement that a FELA plaintiff show proximate cause" is "not mandated by the Supreme Court's statement in *Rogers*").

The "relaxed" standard of causation that has become entrenched in many jurisdictions will continue to affect the outcome of numerous FELA cases. Several thousand FELA lawsuits are filed each year. Other than in the occasional case where the railroad defendant admits liability, causation is an element of the plaintiff's case in each such lawsuit. In those cases where the court applies a

relaxed standard of causation FELA takes on the character of an insurance program, no longer resembling the statute Congress enacted in 1908. *See Gottshall*, 512 U.S. at 543 ("FELA 'does not make the employer the insurer of the safety of his employees while they are on duty.'")

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOINT APPENDIX

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In the Supreme Court of the United States

CSX TRANSPORTATION, INC ,

Petitioner,

v

ROBERT MCBRIDE,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

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U.S. District Court
Southern District of Illinois (East St. Louis)

CASE #: 3:06-cv-01017-JPG-CJP

McBride v. CSX Transportation Inc

Assigned to: Judge J. Phil Gilbert

Date Filed:	#	Docket Text
		* * * *
12/13/2006	2	COMPLAINT against CSX Transportation Inc (Filing fee $350), filed by Robert McBride (Nowak, Michael) (Entered 12/13/2006)
		* * * *
01/23/2007	4	ANSWER to Complaint and Affirmative Defenses with Jury Demand by CSX Transportation Inc (Bax, James) Modified on 1/25/2007 (car) (Entered 01/23/2007)
		* * * *
08/18/2008	40	Minute Entry for proceedings held before Judge J Phil Gilbert (kjr) Day 1 of Jury Trial held on 8/18/2008 Jurors Impaneled Jurors sworn Plaintiff presents evidence and testimony Jurors to return at 8 30 a m on 8/19/08 (Court Reporter Jane McCorkle) (dka,) (Entered 08/19/2008)

Date Filed:	#	Docket Text
08/19/2008	41	Minute Entry for proceedings held before Judge J Phil Gilbert (kjr) Jury Trial completed on 8/19/2008 Plaintiff presents evidence and testimony Plaintiff rests Oral Motion for Judgment as a Matter of Law by defense counsel is denied Defendant presents evidence and testimony Defendant rests Conference re jury instructions held Final arguments given Verdict read and jury polled Verdict in favor of plaintiff and against defendant in amount of $275,000 00 Jury excused (Court Reporter Jane McCorkle) (dka,) (Entered 08/20/2008)
08/19/2008	42	JURY VERDICT(dka,) (Entered 08/21/2008)
08/21/2008	43	Jury Instructions given (dka,) (Entered 08/21/2008)
08/21/2008	44	Jury Instructions withdrawn/refused (dka,) (Entered 08/21/2008)
08/21/2008	45	Jury Instructions "clean" (dka,) (Entered 08/21/2008)

* * * *

Date Filed:	#	Docket Text
08/21/2008	47	EXHIBITS re 41 Jury Trial consisting of one envelope (placed in Benton vault) (dka,) (Entered: 08/21/2008)
08/21/2008	48	CLERK'S JUDGMENT (NGJ/dka) in favor of Robert McBride against CSX Transportation Inc Approved by Judge J Phil Gilbert on 8/21/08 (dka,) (Entered 08/21/2008)
		* * * *
08/28/2008	51	MOTION for New Trial by CSX Transportation Inc Responses due by 9/30/2008 (Attachments # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7)(Bax, James) (Entered 08/28/2008)
08/28/2008	52	MEMORANDUM in Support re 51 MOTION for New Trial filed by CSX Transportation Inc (Bax, James) (Entered 08/28/2008)
		* * * *
09/08/2008	56	MEMORANDUM AND OPINION, Denying 51 MOTION for New Trial filed by CSX Transportation Inc, Granting 49 MOTION for Taxation of Costs filed by Robert McBride Signed by Judge J Phil Gilbert on 9/8/08

Date Filed:	#	Docket Text
		(bkl) (Entered 09/08/2008)
10/07/2008	57	NOTICE OF APPEAL by CSX Transportation Inc Filing fee $ 455 (Bax, James) (Entered 10/07/2008)
		* * * *
10/29/2008	67	Transcript of Jury Trial Proceedings Minus Voir Dire held on 8/18/08, 8/19/08, before Judge Judge Gilbert Court Reporter/Transcriber Jane McCorkle, Telephone number 618-439-7725
		* * * *
07/16/2010	78	Notice of Settlement *and Dismissal* by Robert McBride (Attachments # 1 Exhibit A) (Marcus, Robert) (Entered 07/16/2010)
		* * * *

Seventh Circuit Court of Appeals

Court of Appeals Docket #: 08-3557

Robert McBride v. CSX Transportation, Incorporat

Appeal From: Southern District of Illinois

Trial Judge: J. Phil Gilbert, District Court Judge

* * * *

01/08/2009	9	15 copies Appellant's brief filed by Appellant CSX Transportation, Incorporated [6085575] [9] Disk Filed [08-3557]
01/08/2009	10	Filed 10 copies Appendix by Appellant CSX Transportation, Incorporated [6085576] [08-3557]

* * * *

04/15/2009	19	15 copies Appellee's brief filed by Appellee Robert McBride [6120002] [19] Disk filed [08-3557]--[Edited 04/17/2009 by LJ]

* * * *

04/29/2009	24	15 copies Appellant's reply brief filed by Appellant CSX Transportation, Incorporated [6124776] [24] Disk Filed [08-3557]

* * * *

05/29/2009	26	Case heard and taken under advisement by panel Kenneth F Ripple, Circuit Judge, Ilana Diamond Rovner, Circuit Judge and Diane S Sykes, Circuit Judge [6133291] [08-3557]

* * * *

03/16/2010	31	Filed opinion of the court by Judge Ripple AFFIRMED Kenneth F Ripple, Circuit Judge, Ilana Diamond Rovner, Circuit Judge and Diane S Sykes, Circuit Judge [08-3557]
03/16/2010	32	ORDER Final judgment filed per opinion With costs yes [32] [08-3557]

* * * *

03/29/2010	34	Filed 30c Petition for Rehearing and Petition for Rehearing En-banc by Appellant CSX Transportation, Incorporated Dist [08-3557]

* * * *

05/13/2010	40	Filed 30c Answer to Petition for Rehearing and Petition for Rehearing Enbanc by Appellee Robert McBride, per order Dist [08-3557]

06/03/2010	41	ORDER Appellant CSX Transportation, Incorporated Petition for Rehearing and Petition for Rehearing Enbanc is DENIED (Judge Flaum took no part in the consideration or decision of the petition for rehearing en banc) [41] 08-3557]
06/08/2010	42	Motion filed by Appellant CSX Transportation, Incorporated to stay the mandate pending the filing and disposition of a Petition for Writ of Certiorari [42] [08-3557]
		* * * *
06/11/2010	44	Filed Response by Robert McBride to motion to stay the mandate, filed by Appellant CSX Transportation, Incorporated in 08-3557 [42] [6227973] [44] [08-3557]
06/16/2010	45	Filed Reply to Response by Robert McBride to motion to stay the mandate pending the filing and disposition of a petition for certiorari, filed by Appellant CSX Transportation, Incorporated [42] [6229360] [45] [08-3557]

06/24/2010	46	Issued opinion of the court by Judge Ripple DENYING motion to stay the mandate [42] Kenneth F Ripple, Circuit Judge (in chambers) This opinion is being released in typescript form, a published version will be released in due course [6231005] [46] [08-3557]--[Edited 06/24/2010 by JAD]
07/01/2010	47	Filed opinion of the court by Judge Ripple (in chambers) DENYING motion to stay the mandate *This opinion was released initially in typescript form [42] Kenneth F Ripple, Circuit Judge [47] [6232619] [08-3557]
07/02/2010	48	Mandate issued with bill of costs in the amount of $172 00 Entire record returned consisting of 1 vol pleadings, 1 vol loose pleadings, 1 vol exhibits, [48] [6232998] [08-3557]

* * * *

[1] UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBERT McBRIDE,

Plaintiff,

vs

CSX TRANSPORTATION, INC ,

Defendant

Docket No 06-CV-01017-JPG-CJP
Benton, Illinois

August 18, 2008

VOLUME 1
Trial Proceedings

BEFORE THE HONORABLE J PHIL GILBERT
UNITED STATES DISTRICT COURT JUDGE, and
a jury

APPEARANCES

For the Plaintiff	Mr Robert P Marcus Mr Michael K Nowak Kujawski & Nowak, P C 1331 Park Plaza Drive, Suite 2 O'Fallon, Illinois 62269-1764 618-622-3600 Email kujawskinowak@yahoo com
For the Defendant	Mr James A Bax Brasher Law Firm 211 North Broadway, Suite 2300 St Louis, Missouri 63102 314-621-7700 Fax 314-621-1088 Email jbax@brasherlaw com
Court Reporter	Jane McCorkle 301 W Main Street Benton, Illinois 62812 618-439-7725 janemccorkle@verizon net

[19] * * * *

MR MARCUS Yes, Your Honor, we call — plaintiff's call D J Baker

DEMETRIUS JEROME BAKER, having been duly sworn, testified as follows

THE CLERK Would you be seated, please State your full name for the record and spell your last name

THE WITNESS My name is Demetrius Jerome Baker, [20] B -A -K -E -R

DIRECT EXAMINATION

BY MR MARCUS

* * * * *

[31] * * * *

Q In your years of experience as a locomotive engineer, tell us what you think was specifically wrong with that train that day

A That the locomotive that was in the lead has a switch engine for switching all day long They weren't designed to do that, and it just wasn't a safe thing to do as far as — it would have been a whole lot simpler to give us the locomotive behind the lead unit and maybe caused 30 minutes to do that and allow us to switch and be relatively incident free as opposed some of us to go ahead and lead and switch with the wide body

[39] * * * *

Q As your experience as a locomotive engineer, tell us what's wrong with switching all day with five locomotives in a train

A It's not — it's not a good idea From — anywhere from the locomotives running in on you, depending on how much weight you have behind you, you could be injured, a back injury, lots of different things into and including your hands as Mr McBride injured himself, and that could have been avoided But I would say overall, it wasn't the safest thing to do It could have been avoided.

* * * *

Q (by Mr Marcus) In your experience as a locomotive [40] engineer, what's wrong with switching all day with a wide body engine?

A I mean it's pretty much a common or a common sense, pretty much, thing They weren't designed to do that so why would I have tried to do the job with something that it wasn't designed to do?

Q Have you operated this train on other days, this train, J734?

A Yes, I have

Q Have you ever done switching all day with a wide body engine?

A Actually, no

Q Okay Were you ever trained to do any switching all day with a wide body engine?

A No

Q Ever done switching all day with five locomotives in the train?

A Not before that Actually, no

Q Were you ever trained to do switching all day with five locomotives in a train?

A No

* * * *

[50] * * * *

MR MARCUS Expert witness, Paul Byrnes

PAUL F BYRNES, having been duly sworn, testified as follows

THE CLERK Would you be seated, please State your full name for the record and spell your last name

THE WITNESS Paul F Byrnes, B-Y-R-N-E-S

DIRECT EXAMINATION

BY MR MARCUS

* * * *

[61] * * * *

Q Okay And based on your review of the materials that you were provided, what's your understanding of Bob McBride's use of the independent brake on April 12th, 2004?

A My understanding is that Mr McBride was assigned to do switching with large drafts or cuts of cars Now because of the weight of the locomotives, he had approximately 2,000,000 pounds of locomotives on the head end that he was operating from Because of the limitations of the draft gear, which actually keeps the cars coupled up together, he had to be [62] extremely careful in how he used that independent or locomotive brake or it would have the effect of just snapping those knuckles like they were made of plastic

So much of the movements that he had to do that day, based on my understanding, he had to actually use what's known as the automatic or the train brakes to slow and stop the switching movements And at the same time, pursuant to CSX operating and air brakes and train handling rules, he had to insure that the locomotive brakes, what's known as bailed off — here again, without trying to get too complicated

Whenever the engineer sets the train brakes, by design the locomotive brakes will also set up unless you do what's called bailing them off Now one of the reasons, one of the reasons that CSX and all other general system railroads require that you bail off the locomotive brakes is because, otherwise, you can end up with flat spots on the wheels or you could overheat the wheels

Because of the enormous amount of weight he had on the rear end, he had to insure that the locomotives did not act like an anchor and allow the cars to snap out and snap knuckles

* * * *

[65] * * * *

Q And do you have an opinion as you sit here today, based on your experience that we previously talked about, do you have an opinion whether the train that the defendant CSX set up for Bob McBride, that is, the wide-body locomotives in the front and five locomotives total, do you have an opinion whether that was unsafe to be used for switching all day?

A I do because the combination of the extreme weight in the locomotive consist, the size of the cuts

of cars he was switching, the fact he had to use the automatic brake valve, combined with the design of the independent brake and the fact that he had to hold that button in for 20 seconds each time he used the automatic brake valve, to me, in combination, it all served to create an unsafe situation, yes

Q You talked about the size and you may have already addressed this, but tell the jury what the problems of the size of the engines and locomotives are

A These AC locomotives are, to be more correct, these General Electric AC 4400 CWs, are approximately 75 feet long They probably weigh in the neighborhood of 410,000 pounds apiece The design of the General Electric locomotive, the radiators extend horizontally out to the sides almost like [66] bat wings

The effect of that is that it diminishes greatly your visibility to the rear The length of the locomotive, it creates blind spots It adds extra pressure, if you will, on the locomotive engineer to be extremely careful when negotiating tight curves, tight radius curves, because of the long wheel base and high axle loadings

And in addition, General Electric locomotives historically have been very slow to load Loading is a term that engineers refer to an engine locomotive revving up and generating power The closest analogy would be like if you had a car that was very slow to rev up

So normally you want fast, nimble locomotives for switching because you're setting cars out, you're picking up cars, you're spotting cars A lot of back and forth Stop That will do Come ahead and go

back The more time it takes you to stop and to rev that locomotive up and generate power to the rail, the more time you're spending and the less work that's getting done

Q Are these locomotives, these wide body 4400 ACs, are they good switching locomotives?

A I have actually ran an AC 4400 I have operated literally thousands of General Electric locomotives, and I certainly would not want to have to switch with the General Electric locomotives that I used In addition, I don't like [67] that type of cab I have actually switched with a comparable cab When I was at the transportation test center in Pueblo, Colorado, I found it to be extremely unwieldy as a switch engine for switching purposes

* * * *

[70] * * * *

CROSS EXAMINATION

BY MR BAX

* * * *

[72] * * * *

Q Okay So if you were making a smaller move, 5, 10, 15 cars, it would not be necessary for him to use the train brakes, and it would not be necessary for him to actuate the air off the independent brake, isn't that correct?

A No, that is not correct because, for example, now you're ratcheting up to 15 cars at this point Let's go with that If you have 15 loads and you are moving 7, 8, 9, 10 miles an hour and then you are told that will do, if you slap on that independent, if you go to fully applied locomotive brakes, you have

2,000,000 pounds of locomotives which you want to stop right now, and those cars are just going to sling-shot out, and you have a very good chance of breaking knuckles and even possibly putting something on the ground

* * * *

[83] UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBERT McBRIDE,

Plaintiff,

vs

CSX TRANSPORTATION, INC.,

Defendant

Docket No 06-CV-01017-JPG-CJP
Benton, Illinois

August 19, 2008

VOLUME 2
Trial Proceedings
BEFORE THE HONORABLE J PHIL GILBERT
UNITED STATES DISTRICT COURT JUDGE, and a jury

APPEARANCES

For the Plaintiff	Mr Robert P Marcus Mr Michael K Nowak Kujawski & Nowak, P C 1331 Park Plaza Drive, Suite 2 O'Fallon, Illinois 62269-1764 618-622-3600 Email kujawskinowak@yahoo com
For the Defendant	Mr James A Bax Brasher Law Firm 211 North Broadway, Suite 2300 St Louis, Missouri 63102 314-621-7700 Fax 314-621-1088 Email jbax@brasherlaw com
Court Reporter	Jane McCorkle 301 W Main Street Benton, Illinois 62812 618-439-7725 janemccorkle@verizon net

[86] * * * *

MR MARCUS Thank you, Your Honor Plaintiffs call Bob McBride

ROBERT K McBRIDE,

having been duly sworn, testified as follows

THE CLERK Would you be seated, please State your full name for the record and spell your last name

THE WITNESS Robert K McBride, M-C-B-R-I-D-E

DIRECT EXAMINATION

BY MR MARCUS

* * * *

[90] * * * *

Q Did you eventually see your train that day?

A Yes, as we was walking out to our train, I saw there was two wide bodies front They're back to back One's facing [91] west and the other is facing east There was three conventional cabs behind them

Q Did that concern you?

A Yes Because I've never switched with a wide body cab before They're not used for switching From Evansville to Nashville, they are used for coal trains and grain trains So I was never trained to use one for switching They are not used for that

Q Did you ever perform switching before?

A Yes, I have

Q And on what type of engines?

A A conventional cab engine

* * * *

[94] * * * *

Q Where did you go after Belnap sighting?

A I went to Lamont, I believe Lamont sighting The only day I worked there I believe it was Lamont sighting and done switching at Lamont

Q How long did you do switching at Lamont?

A Hour and a half, two hours constant switching Because when you switch cars, you have a conductor at the switch and you have a brakeman back between the two tracks The conductor pulls you forward He lines the switch You have to shove back The brakeman calls for three step That's [95] where you have to set all your brakes, set the reverser He closes the angle cock, pulls the pin, you take off Reaches the three step, you take off

And while you're taking off, trying to get that above the switch, the conductor is lining the switch after you get by it, and the brakeman, he's lacing up the air hose Ready to go So when you come back, he walks to the next track, and he does the same thing Takes 15, 20 seconds to cut a car at the most, maybe

Q When you were at Lamont sighting, were you operating the wide body cab that day?

A Yes, I was

Q Were you doing consistent and constant —

A Consistent back and forth At the time we had a hose in cars If you don't put air on the cars, they come in and hit the engines At the time we had five engines You don't switch five engines You've got too much weight So the cars, you don't want them to come in and hit the engines and maybe jackknife them off the track

So you put air on the cars You keep engine brakes released So you kind of are using the cars as your brakes

so you don't burn up the brakes on your engines But you have to feather back and forth the independent and push on the button At the whole time you are grabbing it

Well, you're going from, you have the reverser, [96] your throttle, your automatic, and the independent So you are using your left hand The reverser is going forward and backward on the throttle You're using your right hand on the automatic and the independent So when you set the automatic air, it has to go to the independent and feather it and push the button and keep grabbing it and feather back and forth The whole time you're like this That's on the wide body

* * * *

[98] * * * *

Q And back to the Southwind Riverport sighting, how was your arm and hand feeling at this point, your right arm and right hand?

A At the port I asked D J , I said, "How much more switching do we have to do?" At the time my arm, my fingers, I felt like I had just going up to my elbow Just all day long I had been doing that, grabbing it, pushing the button, grabbing it, pushing the button That's constant what I was doing

* * * *

Q Excuse me What time did you start on April 12th, 2004?

A I started at 10 o'clock in the morning

Q Okay What time did you get hurt?

A Approximately 8 o'clock at night

* * * *

[165] * * * *

THE COURT Were are on the record for the jury instruction conference * * *

* * * *

[166] * * * *

THE COURT * * * No 4, Mr Bax, you have an objection?

MR BAX I do have an objection I think it's a misstatement of the causation standard set forth by the [167] Supreme Court's latest opinion in Norfolk and Southern versus Sorrell, and the cases cited therein

THE COURT Mr Marcus, any response?

MR MARCUS This is a pattern instruction unmodified from the Seventh Circuit It is the causation standard that the Court has been applying in FELA for decades and decades now

THE COURT The Court's going to give it over objection * * *

* * * *

[174] * * * *

THE COURT * * * 11

MR BAX I have to ask for this one, Judge

MR MARCUS We would object, Your Honor, based on the same reasons regarding causation —this is another causation instruction — for the same reason the plaintiffs have already articulated

MR BAX I think proximate cause is the proper standard as set forth by the Supreme Court in Sorrell and the previous Supreme Court opinions on the issue

THE COURT It will be refused over objection * * *

* * * *

[175] * * * *

THE COURT * * * now we are on 14

THE CLERK Thank you

MR BAX I'd better ask for this one, Judge, definition of contributory negligence on the part of the defendant It's modified to include the FELA statute, contributed in whole or in part Also, has the proximate cause language put in there

MR MARCUS We object first about proximate cause and FELA Also, it's duplicate 9 03 of the Seventh Circuit already covered, contributory negligence

THE COURT Be refused 15

MR BAX There's another instruction I have to offer We think this is the proper standard for causation as set forth by the Supreme Court opinions that are cited as well as the Supreme Court's opinion in Norfolk Southern versus Sorrell

MR MARCUS We would object to this based on the [176] same reasons

THE COURT The Court's going to deny 15 Same reasons * * *

* * * *

[204] * * * *

THE COURT Members of the jury, you have seen and heard all the evidence, and you will hear the arguments of the attorneys Now I will instruct you on the law

* * * *

[207] * * * *

At the time of the occurrence, there was in force a federal statute known as the Federal Employers' Liability Act That Act provided that whenever an employee of a railroad is injured while engaged in the course of his [208] employment, the railroad shall be liable in damages to the injured employee where the injury results, in whole or in part, from the negligence of any of the officers, agents or other employees of the railroad

Contributory negligence on the part of the injured employee will not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee

The plaintiff brings this action under the Federal Employers' Liability Act or FELA FELA requires defendant to exercise reasonable care to provide a reasonably safe workplace

To succeed in his FELA claim, plaintiff must prove two things by a preponderance of the evidence 1, the defendant was negligent, and 2, defendant's negligence caused or contributed to plaintiff's injuries

Negligence is the failure to use the care that a reasonably prudent person would use in the same circumstances The law does not say how a reasonably prudent person should act That is for you to decide In deciding whether defendant was negligent, you may consider industry custom or safety rules, but what is reasonable is up to you This responsibility to exercise reasonable care includes assignments of employees to particular tasks

Defendant "caused or contributed to" plaintiff's [209] injury if defendant's negligence played a part — no matter how small — in bringing about the injury The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence

If you find that defendant's negligence played a part in bringing about plaintiff's injuries, you must consider defendant's argument that plaintiff should share responsibility for his own injuries Defendant must prove two things by a preponderance of the evidence First, that the plaintiff was negligent, and second, that plaintiff's negligence caused or contributed to his own injuries

* * * *

[213] * * * *

We are now going to the hear the closing arguments of counsel Mr Marcus, who represents the plaintiff and has the burden of proof in this case, will have the opportunity to go first and last

MR BAX Your Honor, may I move over here?

THE COURT Yes, you may

MR MARCUS Thank you, Your Honor May it please the Court We're almost done Thank you for your time today

* * * *

[214] * * * We showed you, just like I said in opening, that locomotive was not meant for switching, and it was unsafe to switch with five locomotives in a train

You heard the testimony of D J Baker He talked about it You heard the testimony of Bob McBride He talked about it You also heard testimony of Paul Byrnes who worked for the FRA and has a law degree, and it was his opinion it was unsafe, as well They did it the wrong way

Additional negligence is that Bob was never even trained on who to switch these types of engines before He was assigned to do it He was — the person that assigned him wasn't aware of his riding history, but he was

never trained And up until April 12th, 2004, Bob McBride never trained on that, never switched with that type of engine that day or that type of setup

Bob followed the rules He and D J , they saw the train They got their orders They called the yardmaster The yardmaster said, "Take it Just take it " They followed the rules They didn't complain They are just doing their job just like most other people Not a single CSX supervisor called Bob McBride after that CSX did nothing after they were told that there were concerns by the people that drive their trains across public crossings that they believe these engines were not safe If he was given the right locomotive [215] and the right train setup, this accident would never have happened

It's hard to compare to a lot of things But it's almost like you could take a big old sledgehammer, a big old sledgehammer, take a little tiny nail and try to use this 20-pound sledgehammer, 20-pound sledgehammer, on a little tiny nail Can you do it? Yes Is it unsafe and risky? Yes Can you hurt yourself and others? Yes And that's what it's like We're not saying it's the wrong equipment, it was the wrong equipment for the task

And plaintiff would never have been put in that position if he was given the proper equipment He would never have had to make these repetitive movements and grips with his right arm He would never have hit his hand It was all because of the improper equipment and use of the equipment for switching

D J Baker first told the railroad that this was unsafe We've told the railroad that this is unsafe Now it's your turn to tell the railroad that this is unsafe

As you just heard through the instructions, we have to prove two things One, defendant was negligent I just went over all the negligence that the defendant did, un-

safe locomotive for switching, a big wide body, five locomotives in a setup for switching That's all unsafe and that was negligence It was negligence to put Bob McBride in that [216] engine seat without having any other training to switch They didn't even look into that That's negligent

What we also have to show is defendant's negligence caused or contributed to Bob's injury It never would have happened but for the defendant giving him that train

Now, you will have an instruction, cause or contributed to cause It says, Any part, no matter how small, no matter how small, and that's the rule, that's the law that he just instructed you on If any part of CSX's negligence contributed to his injury no matter how small, you have to order a verdict for the plaintiff That's what we showed you

* * * *

[229] * * * *

THE COURT Mr Bax Mr Marcus

* * * *

MR MARCUS * * *

Briefly, Bob McBride talked about how these engines aren't used for switching D J Baker talked about how they are not used for switching D J has done this for 11 years He's done that run before D J Baker said he never has used that wide body for switching prior that that day And he told you that

[230] * * * *

One more thing Jim said, there's no operating rules Mr Bax said there's no safety rules that apply We talked about this one In case of doubt or uncertainty,

the safe course must be taken When D J Baker called that [231] yardmaster, did that yardmaster take a safe course that day? Did that yardmaster call Wayne Willoughby? Did any supervising officer at CSX call McBride or D J Baker and ask about the engines aren't set up for switching? No That's the rule A safe course must be taken A safe course was not taken that day

* * * *

[235] * * * *

THE COURT Ms Glover, are you the foreperson?

JUROR GLOVER Yes

THE COURT Please hand the verdict forms to the bailiff The clerk will read the verdict

THE CLERK Did you find that defendant was negligent and the defendant's negligence caused or contributed to plaintiff's injury? Answer Yes

Number two, without taking into consideration any possible negligence by plaintiff, what sum of money did you find to be the total amount of plaintiff's damage? $275,000

Did you find that plaintiff was negligent and that plaintiff's negligence caused or contributed to his own injury? Yes

What percentage of plaintiff's damage do you find to have been caused by the negligence of the respective parties? Plaintiff's, 33 percent, defendant's, 67 percent

This is signed by the foreperson and six other jurors

Juror No 1, Ms Thackery, was this then and is this now your verdict?

JUROR THACKERY Yes

THE CLERK Juror No 2, Mr Eagleson, was this then and is this now your verdict?

JUROR EAGLESON Yes

[236] THE CLERK Juror No 3, Mr Vaughn, was this then and is this now your verdict?

JUROR VAUGHN Yes

THE CLERK Juror No 4, Ms Glover, was this then and is this now your verdict?

JUROR GLOVER Yes

THE CLERK Juror No 5, Mr Keehn, was this then and is this now your verdict?

MR KEEHN Yes

THE COURT Juror No 6, Mr Jones, was this then and is this now your verdict?

MR KEEHN Yes

THE CLERK Juror No 7, Mr Hartke, was this then and is this now your verdict?

MR HARTKE Yes

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBERT McBRIDE, Plaintiff,

vs.

CSX TRANSPORTATION, INC., Defendant.

No. 3:06-cv-01017-JPG-CJP

Special Verdict Form A

1 Do you find that Defendant was negligent and that Defendant's negligence caused or contributed to Plaintiffs injuries?

ANSWER Yes (Yes or No)

If you answer "no" to Question 1, do not answer any more questions

2 Without taking into consideration any possible negligence by Plaintiff, what sum of money do you find to be the total amount of Plaintiffs damages?

ANSWER $275,000

3 Do you find that Plaintiff was negligent and that Plaintiffs negligence caused or contributed to his own injuries?

ANSWER Yes (Yes or No)

Answer Question 4 only if you answered "Yes" to Question 3.

4 What percentage of Plaintiffs damages do you find to have been caused by the negligence of the respective parties?

(Answer in terms of percentages totaling 100%)
Plaintiff 33%
Defendant 67%

Date August 19, 2008

/s/ Kevin Vaughn
/s/ Jeff Jones
/s/ Larry Eagleson
/s/ John J. Keehn
/s/ Elaine Thackrey
/s/ [illegible] Hartke
/s/ [illegible] Glover

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBERT McBRIDE, Plaintiff,

vs.

CSX TRANSPORTATION, INC., Defendant.

No. 3:06-cv-01017-JPG-CJP

Jury Instructions Given

* * * *

[13] Plaintiff's 4

Defendant "caused or contributed to" Plaintiff's injury if Defendant's negligence played a part — no matter how small — in bringing about the injury. The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence.

Source: Seventh Circuit Jury Instructions 9.02 OK

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBERT McBRIDE, Plaintiff,

vs.

CSX TRANSPORTATION, INC., Defendant.

No. 3:06-cv-01017-JPG-CJP

Jury Instructions Refused

* * * *

[14] When I use the expression "proximate cause," I mean any cause which, in natural or probable sequence, produced the injury complained of It need not be the only cause, nor the last or nearest cause It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury

Defendant's Instruction No 11 Refused
IPI No 15 01

* * * *

[16] When I use the expression "contributory negligence," I mean negligence on the part of the plaintiff that contributed in whole or in part to and proximately caused the alleged injury.

Defendant's Instruction No 14 Refused
IPI No 160 04

[17] In order to establish that an injury was caused by the defendant's negligence, the plaintiff must show that (i) the injury resulted "in whole or in part" from the defendant's negligence, and (ii) the defendant's negligence was a proximate cause of the injury

Defendant's Instruction No 15 Refused
Non IPI
45 U S C §51
Conray v S Pac Co, 335 U S 520, 523 (1949)
Tenant v Peoria & Pekin Union Ry Co, 321 U S 29, 32 (1944)
Brady v S Ry Co, 320 U S 476, 483-4 (1943)
Chapman v Union Pac R R, 467 N W 2d 388, 395 (Neb 1991)
Marazzato v Burlington N R Co, 817 P 2d 672, 674-5 (Mont 1991)

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBERT McBRIDE,

Plaintiff,

vs.

CSX TRANSPORTATION, INC.,

Defendant.

Docket No. 3:06-cv-01017-JPG-CJP

NOTICE OF SETTLEMENT AND DISMISSAL

COMES NOW the Plaintiff, Robert McBride, by and through his attorneys, Kujawski & Associates, P.C., and for his Notice of Settlement, respectfully states as follows:

1. That on March 16, 2010, The United States Court of Appeals for the Seventh Circuit entered final judgment, affirming the trial court verdict [[App. Doc. No. 34]]. CSX's Petition for rehearing was denied on June 3, 2010. [[App. Doc. No. 41]]

2. That on June 30, 2010, prior to the issuance of the Mandate, CSX settled the Judgment and paid Plaintiff all monies due and owed. (See Exhibit A, attached hereto and incorporated herein by reference).

3. Defendant's check, attached hereto as Exhibit A, reflects the settlement in this matter. The check has been duly negotiated and received by Plaintiff.

4. That no further controversy exists between the parties.

5. Therefore, Plaintiff dismisses this action with prejudice.

Respectfully submitted,

KUJAWSKI & ASSOCIATES, P.C.

By s/ Robert P. Marcus

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1331 Park Plaza Drive, Suite 2
O'Fallon, Illinois 62269-1764
(618) 622-3600 – Telephone
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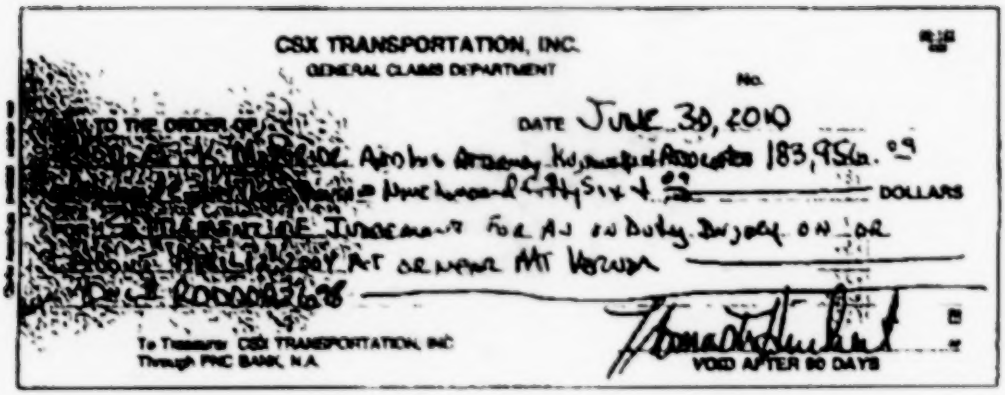
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing document has been electronically filed and therefore Notice of Electronic Filing service is being utilized, pursuant to Electronic Rule 8 this 16th day of July, 2010

s/Robert P. Marcus



CSX TRANSPORTATION, INC.
GENERAL CLAIMS DEPARTMENT
No.
DATE JUNE 30, 2010
PAY TO THE ORDER OF
Airbus Attorney Fees and Associates 183,954.09
DOLLARS
FOR SETTLEMENT JUDGMENT FOR AJ on Duty Injury ON OR
ABOUT APRIL 24, 2009 AT OR NEAR MT VERNON
ID # R0000937636
To Treasurer CSX TRANSPORTATION, INC
Through PNC BANK, N.A.
VOID AFTER 90 DAYS

EXHIBIT
A

BEST AVAILABLE COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBERT McBRIDE,

Plaintiff,

vs.

CSX TRANSPORTATION, INC.,

Defendant.

Docket No. 3:06-cv-01017-JPG-CJP

ORDER

For good cause, the Court hereby **ACKNOWLEDGES** Plaintiff's Notice of Settlement [Doc 78] Accordingly Plaintiff Robert McBride's claims against Defendant CSX Transportation, Inc in this matter are hereby **DISMISSED WITH PREJUDICE**

IT IS SO ORDERED

_____

Judge J. Phil Gilbert
United States District Court

From: Kyle_Oehmke@ilsd uscourts gov] [mailto Kyle_Oehmke@ilsd uscourts gov] **On Behalf Of** JPGpd@ilsd uscourts gov

Sent: Monday, July 19, 2010 8 55 AM

To: Slatonx6@aol com

Cc Christa K Bauer, James A Bax

Subject: Re McBride v CSX Transportation, Inc , No 3 06-cv-01017-JPG-CJP

All,

Per the Court's operating procedures, an order will not be entered concerning the recent notice of voluntary dismissal The notice is self-effectuating, and the Clerk's office has been advised to close the file

Please let me know if you have any questions/concerns

Kyle Christopher Oehmke
Law Clerk to The Honorable J Phil Gilbert
United States District Court
301 West Main Street
Benton, IL 62812
(618) 439-7723
(618) 439-2775 (fax)

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
JAN 13 2011
OFFICE OF THE CLERK

No. 10-235

In the Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

ROBERT MCBRIDE,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER

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643 b
(73)

QUESTION PRESENTED

Whether the Federal Employers' Liability Act, 45 U S C §§ 51-60, requires proof of proximate causation

CORPORATE DISCLOSURE STATEMENT

Petitioner CSX Transportation, Inc. has a parent company, CSX Corporation, which is publicly traded. No other publicly held company owns more than 10 percent of petitioner's stock.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet App 1a-40a) is reported at 598 F 3d 388 The memorandum and order of the district court denying petitioner's motion for reversal, a new trial, or remittitur (Pet App 41a-43a) is unreported but is available at 2008 WL 4185933

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2010 A timely petition for rehearing en banc was denied on June 3, 2010 Pet App 47a The jurisdiction of this Court rests on 28 U S C § 1254(1)

STATUTORY PROVISIONS INVOLVED

The provisions of the Federal Employers' Liability Act, 45 U S C §§ 51-60, are reproduced in an appendix to this brief App , *infra*, 1a-6a

STATEMENT

The Federal Employers' Liability Act (FELA or Act) authorizes a railroad employee to recover for a workplace injury "resulting in whole or in part from the negligence" of the railroad, 45 U S C § 51, with damages reduced in proportion to any contributory negligence by the employee In *Norfolk Southern Railway* v *Sorrell*, 549 U S 158 (2007), this Court addressed whether a defendant's negligence and a plaintiff's contributory negligence are governed by the same causation standard under the Act The Court applied the established principle that "the elements of a FELA claim are determined by reference to the common law" unless the Act contains

"express language to the contrary," *id* at 165-166, and it held, consistent with the common law, that the causation standard is the same for both parties

The petitioner in *Sorrell* had also asked the Court to decide what the causation standard is, and to hold that both the plaintiff and the defendant must prove proximate causation The Court declined to address that question, but two separate opinions in *Sorrell* did In one, Justice Souter, joined by Justices Scalia and Alito, explained that proximate causation was the common-law rule before FELA, that the text of the Act did not change it, that this Court consistently applied the rule in FELA cases throughout the first half of the 20th century, and that, contrary to the view of some lower courts, this Court's decision in *Rogers* v *Missouri Pacific Railroad*, 352 U S 500 (1957), did not adopt a different rule *Sorrell*, 549 U S at 172-177 (Souter, J , concurring) In the other separate opinion, Justice Ginsburg, writing only for herself, disagreed with this analysis *Id* at 177-182 (Ginsburg, J , concurring in the judgment)

In this case, the Seventh Circuit acknowledged that the three-Justice concurrence in *Sorrell* has "considerable force," Pet App 35a, but ultimately chose not to follow it, believing that it would be inappropriate "to anticipate future actions of the Supreme Court," *id* at 36a The court of appeals thus "decline[d] to hold that * * * common-law proximate causation is required to establish liability under the FELA " *Id* at 39a

The three-Justice concurrence in *Sorrell* is correct, and the decision below is wrong Proximate causation is required under both the settled methodology for interpreting FELA and more than 20 of

this Court's decisions The Court should so hold and reverse the judgment of the court of appeals

A. Statutory Background

Enacted in 1908, FELA establishes a compensation scheme for injuries sustained by railroad employees in the workplace The Act provides for concurrent jurisdiction of state and federal courts, 45 U S C § 56, but substantively FELA actions are governed by federal law *Sorrell*, 549 U S at 165 State-law remedies are preempted *Ibid*

Unlike workers' compensation laws, which typically provide relief without regard to fault, FELA is a negligence statute In language that has not been amended since its enactment, Section 1 provides

> Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier

45 U S C § 51 The basic elements of a FELA cause of action are thus "breach of a duty of care (that is, conduct unreasonable in the face of a foreseeable risk of harm), injury, and causation" *Consol Rail Corp* v *Gottshall*, 512 U S 532, 538 (1994) [1]

---

[1] The elements of duty and breach can be satisfied by a showing that the defendant violated certain safety statutes—for example, the Safety Appliance Act, 49 U S C § 20301 *et seq* See, *e g*, *Norfolk & W Ry* v *Hiles*, 516 U S 400, 409 (1996) "Once the violation is established, only causal relation is in issue" *Carter* v *Atlanta & St Andrew's Bay Ry*, 338 U S 430, 434 (1949)

"Absent express language to the contrary," these elements, and a railroad's defenses, "are determined by reference to the common law" *Sorrell*, 549 U S at 165-166 The Act "did away with several common-law tort defenses that had effectively barred recovery by injured workers" *Gottshall*, 512 U S at 542 But "[o]nly to the extent of these explicit statutory alterations is FELA 'an avowed departure from the rules of the common law'" *Id* at 544 (quoting *Sinkler* v *Mo Pac R R*, 356 U S 326, 329 (1958))

"One notable deviation from the common law," *Sorrell*, 549 U S at 166, is FELA's rejection of "the doctrine of contributory negligence in favor of that of comparative negligence," *Gottshall*, 512 U S at 542-543 "At common law, of course, a plaintiff's contributory negligence operated as an absolute bar to relief" *Sorrell*, 549 U S at 166 Under Section 1 of the Act, in contrast, a railroad is liable even if the injury resulted only "in part" from its negligence, 45 U S C § 51, and under Section 3 "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee," 45 U S C § 53 [2]

B. Factual Background

Petitioner CSX Transportation, Inc (CSXT) operates an interstate system of railroads In addition

---

[2] An employee may not be found contributorily negligent—and thus damages will not be reduced—in a case in which the injury was caused by the railroad's violation of a safety statute 45 U S C § 53 For these purposes, see 45 U S C § 54a, a safety statute includes a regulation issued under the Federal Railroad Safety Act, 49 U S C § 20101 *et seq*

to transporting freight over long distances, it makes "local" runs that pick up individual rail cars for long-distance transportation or deliver cars to their final destinations. At each stop on a local run, cars are added to or removed from the train in a process known as "switching," which requires more frequent starts and stops than a long-distance journey. Pet. App. 2a.

Trains use multiple braking systems in slowing to a stop. The "automatic brake" slows the cars of the train, while a separate "independent brake" slows the locomotives. The automatic brake normally activates the independent brake as well, and careless use of the former can cause the locomotives to brake too quickly, leading the rear cars to run into the front ones. To slow a long train, engineers apply the automatic brake while releasing the independent brake, a maneuver known as "actuating" or "bailing off" the independent brake. Standard practice is to actuate the independent brake for four seconds per locomotive. Pet. App. 2a.

On certain models of heavier, "wide-body" locomotives, the independent brake is actuated by pressing a button on the side of the brake handle. On some smaller, "conventional" locomotives, engineers actuate the independent brake by pushing the handle down with one hand. Pet. App. 2a-3a.

Respondent McBride was a locomotive engineer for CSXT. On April 12, 2004, he was assigned to a local run on a train with five locomotives, the front two of which were wide bodies and the other three of which were conventional engines. Towards the end of the run, McBride reached to release the independent brake and hit his hand on the brake

handle in the lead wide-body locomotive The injury produced swelling and pain McBride sued CSXT under FELA, alleging that the train assigned to him was unsafe for switching and that his repeated pressing and holding of the actuator button had fatigued his hand, causing the injury Pet App 3a-5a

C. Proceedings In The District Court

1 At trial, McBride's theory of negligence was that the type and number of locomotives on his train increased the risk of derailment or collision McBride's railroad expert, Paul Byrnes, testified that wide-body locomotives have diminished visibility and more difficulty on curved tracks JA 13a-15a Byrnes also expressed the opinion that the use of five locomotives required careful braking, otherwise, he said, the locomotive brakes could be damaged, the cars could "sling-shot out," and there would be "a very good chance of breaking knuckles [between the cars] and even possibly putting something on the ground" JA 12a-13a, 16a McBride himself testified that he was concerned about the type and number of locomotives because he had not been trained to switch with a wide-body engine and feared that the extra weight of the locomotives could cause the rear cars "to come in and hit the engines and maybe jack-knife them off the track" JA 18a-19a

There was no derailment or collision in this case, however McBride's theory of causation, as his lawyer expressed it in his summation, was that the injury to his hand "never would have happened but for the defendant giving him that train" JA 26a Elaborating on this "but for" theory, McBride's lawyer told the jury that, if he had been "given the right lo-

comotive and the right train setup" (*i e*, fewer and narrower locomotives), McBride (1) would "never have had to make these repetitive movements and grips with his right arm" (because he would have needed less time to bail off the brake and would have done so with his whole hand rather than his thumb), (2) would never have fatigued his hand, (3) would "never have hit his hand" on the brake, and (4) would never have experienced swelling and pain JA 25a

2 McBride's proffered jury instruction 4, on causation, made no reference to proximate causation It stated

> Defendant "caused or contributed to" Plaintiff's injury if Defendant's negligence played a part—no matter how small in bringing about the injury The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence

Pet App 5a, JA 31a

CSXT objected to the charge, arguing that it was "a misstatement of the causation standard" JA 21a In response, McBride pointed out that it was "a pattern instruction unmodified from the Seventh Circuit" *Ibid* The commentary to the pattern instruction cites this Court's decision in *Rogers* for the proposition that "[t]he common law standard of proximate cause does not apply" in FELA actions 7th Cir Pattern Civil Jury Instrs § 9 02 cmt a The district court ruled that it was "going to give [the instruction] over objection" JA 21a

CSXT's proffered jury instruction 15 would have required McBride to prove proximate causation It stated

> In order to establish that an injury was caused by the defendant's negligence, the plaintiff must show that (i) the injury resulted "in whole or in part" from the defendant's negligence, and (ii) the defendant's negligence was a proximate cause of the injury

Pet App 6a, JA 34a

CSXT argued that the proffered charge reflected "the proper standard for causation as set forth by the Supreme Court opinions that are cited" in the charge, which hold—like many other decisions of this Court—that FELA requires proximate causation JA 22a, see JA 34a (citing *Brady* v *S Ry*, 320 U S 476, 483-484 (1943), *Tennant* v *Peoria & Pekin Union Ry*, 321 U S 29, 32 (1944), and *Coray* v *S Pac Co*, 335 U S 520, 523 (1949)) McBride objected, "based on the same reasons" he had previously stated JA 22a The district court denied the requested instruction for the "[s]ame reasons" *Ibid*

The district court also rejected CSXT's instruction 14, on contributory negligence, which likewise would have required a finding of proximate causation, and CSXT's instruction 11, which explained what proximate cause means JA 21a-22a CSXT's instruction 14 stated

> When I use the expression "contributory negligence," I mean negligence on the part of the plaintiff that contributed in whole or in

> part to and proximately caused the alleged injury

JA 33a CSXT's instruction 11 stated

> When I use the expression "proximate cause," I mean any cause which, in natural or probable sequence, produced the injury complained of It need not be the only cause, nor the last or nearest cause It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury

Pet App 6a, JA 32a

3 In the charge it delivered, the district court paraphrased Section 1 of FELA, instructing the jury that the Act imposes liability

> where the injury results, in whole or in part, from the negligence of any of the officers, agents or other employees of the railroad

JA 23a Dividing that language into FELA's basic elements, the court next told the jury that McBride was required to prove that

> 1, the defendant was negligent, and 2, defendant's negligence caused or contributed to plaintiff's injuries

Ibid

The district court then delivered McBride's proffered instruction, approved at the charging conference, on the element of causation The court informed the jury that

> [d]efendant "caused or contributed to" plaintiff's injury if defendant's negligence played a

> part—no matter how small—in bringing about the injury

JA 23a. The court did not give CSXT's proffered instruction on proximate causation or otherwise mention that concept during the charge.

4. After a two-day trial, the jury returned a verdict for McBride, finding that CSXT was negligent and that its negligence caused or contributed to his injury. The jury also found McBride to have been contributorily negligent. It awarded damages of $275,000, of which 67 percent was attributed to CSXT's negligence and 33 percent to McBride's. The district court entered judgment in the amount of $184,250. It subsequently denied CSXT's post-trial motion, which argued, among other things, that CSXT was entitled to a new trial because the court failed to give an instruction on proximate cause. Pet. App. 7a, 41a-44a; JA 9a, 17a, 27a-30a.

D. The Court Of Appeals' Decision

CSXT appealed, arguing that FELA requires proof of proximate causation. The court of appeals rejected that argument and affirmed. Pet. App. 1a-40a. Although the court stated that "the question we must resolve is whether Section 1 of the FELA * * * abrogates the common-law rule of proximate cause," *id.* at 7a, the thrust of the court's opinion was not so much that FELA does abrogate the rule as that it would be inappropriate for a lower court to hold that it does not. The court recognized that there was much to be said for the view that proximate causation is an element of a FELA plaintiff's case, but suggested that only this Court could so hold.

The court of appeals acknowledged, for example, that, "[a]bsent express language to the contrary, the elements of a FELA claim are determined by reference to the common law", that "[p]roximate causation is not explicitly mentioned in the statute", and that this Court "never has identified proximate causation as among those principles of common law that have been abrogated by the FELA" Pet App 35a (quoting *Sorrell*, 549 U S at 165-166) The court also acknowledged that this Court's early decisions "required that the [plaintiff's] injury be a direct or proximate result of * * * the negligent act[] in order for liability under the FELA to be imposed" and that those cases "never have been overruled explicitly" *Id* at 11a-12a In particular, the court observed, this Court's decision in *Rogers* did not "explicitly overrul[e] earlier FELA cases that had spoken in terms of common-law proximate cause" *Id* at 18a And the court identified a reason for *not* reading *Rogers* to have abandoned proximate cause—namely, that *Rogers* "involved multiple causes," not the requisite directness of a cause, and addressed "the issue of when a case with multiple causes must be submitted to a jury" *Id* at 35a-36a

The court of appeals thus acknowledged that the three-Justice concurrence in *Sorrell* has "considerable force" Pet App 35a But it nevertheless concluded that four "countervailing considerations" prevented it from holding that FELA requires proof of proximate causation *Id* at 36a

First, the court of appeals pointed out that it "ha[s] been admonished not to anticipate future actions of the Supreme Court" Pet App 36a The court relied on that consideration even though (a) the import of the admonition is that a lower court is

obliged to follow decisions of this Court that have not been "expressly overrule[d]," *United States* v *Hatter*, 532 U S 557, 567 (2001), and (b) the court recognized that this Court's decisions holding that FELA requires proof of proximate causation have not been expressly overruled

Second, the court of appeals stated that it "must treat with great respect the prior pronouncements of the Supreme Court"—including the statement in *Gottshall* that "a relaxed standard of causation applies under FELA," 512 U S at 543—"even if those pronouncements are technically dicta" Pet App 37a The court implicitly rejected CSXT's arguments that earlier holdings of this Court control over later dicta, Pet C A Reply Br 14 n 3, and that, in any event, *Gottshall*'s "relaxed standard" dictum is best understood as a reference to *Rogers*' holding that FELA allows recovery even when the railroad bears only a small proportion of responsibility for the injury, Pet C A Br 39

Third, the court of appeals expressed concern that a holding in CSXT's favor "would cause a conflict with every other [federal] court of appeals," each of which "ha[s] taken the view, based on *Rogers*, that there is a 'relaxed' standard of [causation] under the FELA" Pet App 38a The court relied on that consideration despite the fact that, like *Gottshall*, "many of these cases simply recite 'the general proposition that FELA employs a "relaxed standard" of causation, without discussing (or even mentioning) proximate cause,'" *id* at 25a n 6 (quoting Pet C A Reply Br 19), and despite the court's recognition that a number of state courts of last resort "still apply traditional formulations of proximate cause in FELA cases," *id* at 35a n 7

Fourth, the court of appeals believed that "[c]ongressional inaction, in the wake of *Rogers* and circuit law broadly interpreting *Rogers*, counsels against adopting a common-law formulation of [proximate] cause in FELA cases" Pet App 38a-39a The court relied on that consideration even though it acknowledged that (a) this Court's only square *holdings* on point are that FELA requires proof of proximate causation and (b) there is no consensus in the lower courts on that issue

"In light of these considerations," the court of appeals "decline[d] to hold that * * * common-law proximate causation is required to establish liability under the FELA" Pet App 39a It therefore determined that the district court did not "commit[] instructional error in refusing CSX[T]'s proffered instruction" on proximate cause *Ibid*

SUMMARY OF ARGUMENT

FELA requires proof that the railroad's negligence was a proximate cause of the employee's injury

A Proximate causation is required under the established methodology for interpreting FELA Under that methodology, which this Court employed most recently in *Norfolk Southern Railway* v *Sorrell*, 549 U S 158 (2007), "the elements of a FELA claim are determined by reference to the common law," unless the Act includes "express language to the contrary" *Id* at 165-166 Proximate causation was "clear common law" when FELA was enacted, *id* at 173 (Souter, J , concurring), and it remains the common-law rule today That leaves just the question whether there is any express statutory language that abrogates it There is none

The Act states that an employee may recover for an injury "resulting in whole or in part" from the railroad's negligence 45 U S C § 51 As the Court explained in *Sorrell*, that language "make[s] clear that there could be recovery against the railroad even if it were only partially negligent," 549 U S at 170—*i e*, if the railroad's negligence were only *one of the causes* of the injury The statutory language does not address the requisite *directness* of a cause, which is therefore governed by the common law By authorizing recovery for an injury "resulting in whole or in part" from the railroad's negligence, while "sa[ying] nothing * * * about the familiar proximate cause standard," *id* at 174 (Souter, J , concurring), FELA simply provides that an employee may recover when the railroad's negligence is one of the proximate causes of the injury

B Proximate causation is also required under this Court's precedents, more than 20 of which have "recognized and applied proximate cause as the proper standard [under] FELA" *Sorrell*, 549 U S at 174 (Souter, J , concurring) In these cases, the Court has viewed the proximate-cause standard as so uncontroversial as to "require no reasoning to demonstrate," *St Louis, Iron Mountain & S Ry* v *McWhirter*, 229 U S 265, 280 (1913), and it has stated the standard in the clearest possible terms, explaining that it is "incumbent" upon a FELA plaintiff to prove that the defendant's "negligence was the proximate cause in whole or in part of the * * * accident," *Tennant* v *Peoria & Pekin Union Ry*, 321 U S 29, 32 (1944) The Court has also made clear that "but for" causation is insufficient, explicitly contrasting negligence that is the "proximate cause" of an injury with negligence that

"merely creates an incidental condition or situation in which the accident * * * results in such injury," *Davis* v *Wolfe*, 263 U S 239, 243 (1923), and it has repeatedly relied on this distinction in reversing jury verdicts for plaintiffs Contrary to the suggestion of the court of appeals that *Coray* v *Southern Pacific Co*, 335 U S 520 (1949), is somehow "inconsistent" with these decisions, Pet App 12a (internal quotation marks omitted), *Coray* expressly stated that FELA authorizes recovery when the railroad's negligence "was the sole or a contributory proximate cause" of the employee's injury, and it held that a jury could find proximate causation in that case because the negligence and injury "were inseparably related to one another in time and space" *Coray*, 335 U S at 523, 524

This Court's decision in *Rogers* v *Missouri Pacific Railroad*, 352 U S 500 (1957), did not silently overrule these 20-plus decisions, as a number of lower courts with which the court below aligned itself have mistakenly concluded *Rogers* simply rejected the view that a railroad's negligence must be the "sole" proximate cause of an employee's injury *Rogers*, 352 U S at 506 It explained that an employee may recover under the Act if the railroad's negligence "played any part, even the slightest," in causing the injury, and that it does not matter that the injury may have had "other causes, including the employee's contributory negligence" *Ibid* That language addressed "multiplicity of causations," not "the necessary directness of * * * causation" *Sorrell*, 549 U S at 175 (Souter, J, concurring) It confirmed that, when the statute says that an employee may recover for an injury resulting "in whole or in part" from the railroad's negligence, 45 U S C § 51, "in

part" means in "any part, even the slightest." As far as "existing law governing the *degree* of causation necessary for redressing negligence" is concerned, *Rogers* "left th[e] law where it was." *Sorrell*, 549 U.S. at 173, 174 (Souter, J., concurring) (emphasis added).

Far from having rejected proximate cause, *Rogers* assumed that FELA requires it. *First*, the trial court's jury instructions in *Rogers*, with which this Court "took no issue," *Sorrell*, 549 U.S. at 176 (Souter, J., concurring), and to which the Court assumed the "verdict was obedient," *Rogers*, 352 U.S. at 505, "covered the requirement to show proximate cause," *Sorrell*, 549 U.S. at 176 (Souter, J., concurring). *Second*, the plaintiff-petitioner in *Rogers* did not ask this Court to abandon proximate cause, but argued merely that the evidence permitted a jury finding that the railroad's negligence was "the proximate cause of [his] injury." Brief for Petitioner at 12, *Rogers* v. *Mo. Pac. R.R.*, 352 U.S. 500 (1957) (No. 28), *available at* 1956 WL 89025. *Third*, no fewer than three of "the prior cases on which *Rogers* relied" to support the proposition that the railroad's negligence need only have played "any part" in the employee's injury "unambiguously recognized proximate cause as the standard applicable in FELA suits." *Sorrell*, 549 U.S. at 175-176 (Souter, J., concurring). *Fourth*, the dissenting Justices in *Rogers* did not understand the Court to have established any new principle of causation, but argued merely that the Court had improperly substituted its view of the evidence for that of the lower court. See *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 532-533, 536-537, 540-541 (1957) (Frankfurter, J., dissenting), *id.* at 562-563 (opinion of Harlan, J.).

The court of appeals interpreted two of this Court's post-*Rogers* decisions—*Crane* v *Cedar Rapids & Iowa City Railway*, 395 U S 164 (1969), and *Consolidated Rail Corp* v *Gottshall*, 512 U S 532 (1994)—to have adopted a standard "less stringent than proximate cause" Pet App 19a *Crane* cited *Rogers* for the proposition that a FELA plaintiff "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's [negligence]," 395 U S at 166, and *Gottshall* cited *Rogers* for the proposition that "a relaxed standard of causation applies under FELA," 512 U S at 543 But as the court of appeals recognized, Pet App 37a, these statements are dicta, and thus they cannot control over the *holdings* of this Court that FELA requires proof of proximate causation In any event, the dicta are properly understood to mean only that—as *Rogers* held—proximate cause under FELA is not "*exclusive* proximate cause," *Sorrell*, 549 U S at 175 (Souter, J , concurring) (emphasis added), and thus the Court's later dicta can be reconciled with its earlier holdings The view that post-*Rogers* decisions of this Court somehow abandoned proximate causation in FELA cases is particularly indefensible given that, over the last three decades, the Court has explicitly held that *other* statutes that authorize private parties to recover for injuries resulting from tortious conduct incorporate the common-law requirement of proximate cause See *Associated Gen Contractors of Cal , Inc* v *Cal State Council of Carpenters*, 459 U S 519, 532-533 (1983) (antitrust), *Holmes* v *Sec Investor Prot Corp* , 503 U S 258, 267-268 (1992) (RICO), *Dura Pharm , Inc* v *Broudo*, 544 U S 336, 344 (2005) (securities fraud)

C The court of appeals also relied on FELA's remedial purpose and post-*Rogers* congressional inaction, but neither supports that court's holding that FELA does not require proximate cause As to the former, this Court rejected the same theory in *Sorrell*, explaining that "the statute's remedial purpose cannot compensate for the lack of a statutory basis" for liability 549 U S at 171 As to the latter, "congressional inaction * * * deserve[s] little weight in the interpretive process," *Alexander* v *Sandoval*, 532 U S 275, 292 (2001) (internal quotation marks omitted), and, in any event, this Court's only square holdings on point are that FELA requires proximate causation If anything is to be inferred from congressional inaction, therefore, it is that Congress does not disapprove of this Court's *holdings*

ARGUMENT

FELA REQUIRES PROOF OF PROXIMATE CAUSATION

FELA requires proof of proximate causation—*i e*, proof "that the injury was the natural and probable consequence of the negligence," *Brady* v *S Ry*, 320 U S 476, 483 (1943) (quoting *Milwaukee & St Paul Ry* v *Kellogg*, 94 U S 469, 475 (1876))—for two related reasons *First*, proximate causation is required under the established methodology for interpreting FELA *Second*, proximate causation is required under this Court's precedents, more than 20 of which have applied the rule in FELA cases Neither the remedial purpose of the Act nor congressional inaction—two of the grounds on which the

court of appeals relied—supports its contrary conclusion [3]

A. Proximate Causation Is Required Under The Established Methodology For Interpreting FELA

As *Norfolk Southern Railway* v *Sorrell*, 549 U S 158 (2007), and many other decisions of this Court make clear, FELA presumptively incorporates common-law principles Proximate causation is one of the most fundamental of those principles, and nothing in the Act abrogates it

1. FELA incorporates common-law principles unless its text expressly provides otherwise

FELA "is founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms " *Urie* v *Thompson*, 337 U S 163, 182 (1949) As this Court observed in *Sorrell*, the elements of a FELA claim,

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[3] McBride has never challenged CSXT's proposed jury instructions, see Pet App 6a, JA 32a-34a, on the ground that they do not accurately describe proximate causation, and neither the district court nor the court of appeals rejected them on that basis Instead, McBride and the lower courts took the position that the instructions were improper because proximate causation is not an element of a FELA claim, and the only question before this Court is whether FELA does in fact require proof of proximate causation While it is unnecessary for the Court to dictate the particular language used in proximate-cause instructions, the Court should make clear that, whatever its precise formulation, proximate causation under FELA has the same basic meaning that it had at common law That conclusion is compelled both by the Court's interpretive methodology and by its precedents, which articulate the standard in familiar common-law terms, see *infra*, pp 27-30

and the defenses to such a claim, are therefore determined "by reference to the common law," unless the Act includes "express language to the contrary" *Sorrell*, 549 U S at 165-166, accord *Consol Rail Corp* v *Gottshall*, 512 U S 532, 544 (1994) (unless "common-law principles * * * are expressly rejected in the text of the statute, they are entitled to great weight")

Express language in FELA abrogates several "common-law tort defenses that had effectively barred recovery by injured workers," *Gottshall*, 512 U S at 542-543—namely, the fellow-servant rule, contributory negligence, assumption of risk, and exemption from the Act through contract, see 45 U S C §§ 51, 53-55 With the exception of these "explicit statutory alterations," *Norfolk & W Ry* v *Ayers*, 538 U S 135, 145 (2003) (quoting *Gottshall*, 512 U S at 544), however, FELA was meant to incorporate the common law Accordingly, when the Act "d[oes] not deal" with a "well-established [common-law] doctrine," this Court infers that Congress did not "intend[] to abrogate that doctrine *sub silentio*" *Monessen Sw Ry* v *Morgan*, 486 U S 330, 337-338 (1988)

Finding no clear contrary indication in the statutory text, the Court has followed the common law in holding that a right of action for personal injury is extinguished by the death of the injured party, *Mich Cent R R* v *Vreeland*, 227 U S 59, 67-68 (1913), that FELA authorizes recovery for occupational disease, *Urie*, 337 U S at 182, negligent infliction of emotional distress, *Gottshall*, 512 U S at 549-550, and fear of cancer, *Ayers*, 538 U S at 149, that FELA does not allow pre-judgment interest, *Monessen Sw Ry*, 486 U S at 337-338, and that

FELA provides for joint and several liability, *Ayers*, 538 U S at 163-165 Most recently, in *Sorrell*, the Court concluded that "[t]he fact that the common law applied the same causation standard to defendant and plaintiff negligence, and FELA did not expressly depart from that approach, is strong evidence against [applying] disparate standards " 549 U S at 168

2. Proximate causation is a fundamental common-law principle, which the text of the Act does not abrogate

a "Prior to FELA, it was clear common law that a plaintiff had to prove that a defendant's negligence caused his injury proximately, not indirectly or remotely " *Sorrell*, 549 U S at 173 (Souter, J , concurring), see, *e g* , 3 John D Lawson, *Rights, Remedies & Practice* § 1028, at 1740 (1890) ("[n]atural, proximate, and legal results are all that damages can be recovered for"), 1 Thomas G Shearman & Amasa A Redfield, *A Treatise on the Law of Negligence* § 26, at 27 (5th ed 1898) ("The breach of duty, upon which an action is brought, must be not only the cause, but the proximate cause, of the damage to the plaintiff ") As Justice Holmes put it in an opinion of the Court issued shortly after FELA's enactment "The general tendency of the law, in regard to damages at least, is not to go beyond the first step As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss " *S Pac Co v Darnell-Taenzer Lumber Co* , 245 U S 531, 533-534 (1918)

That, of course, remains the law today See, *e g* , 1 Dan B Dobbs, *The Law of Torts* § 180, at 443 (2001) ("To prevail in a negligence action, the plain-

tiff must * * * show[] that the defendant's negligent conduct was not only a cause in fact of the plaintiff's harm, but also a proximate or legal cause"), W Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 41, at 263 (5th ed 1984) (proximate cause is "[a]n essential element of the plaintiff's cause of action for negligence") "While 'the common law' is anything but monolithic, there are some principles that are universal, and the requirement that a negligence plaintiff show proximate cause—in the sense of a legally sufficient connection beyond simple cause in fact—is part of the common law of torts in all jurisdictions" *Kaab* v *Utah Ry*, 221 P 3d 219, 230 (Utah 2009)

The requirement of proximate causation is "a necessary limitation on liability" *Exxon Co., U S A* v *Sofec, Inc*, 517 U S 830, 838 (1996) It reflects the recognition that, "[i]n a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond" *Holmes* v *Sec Investor Prot Corp*, 503 U S 258, 266 n 10 (1992) (quoting Keeton, *supra*, § 41, at 264) The "chief and sufficient reason" for the rule is thus "the impossibility of tracing consequences through successive steps to the remote cause" and "the necessity of pausing in the investigation of the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries with safety" *Associated Gen Contractors of Cal, Inc* v *Cal State Council of Carpenters*, 459 U S 519, 532 n 24 (1983) (quoting Thomas M Cooley, *Law of Torts* 73 (2d ed 1888)) When the link between the defendant's negligence and the plaintiff's injury is "too tenuous"—when "what is claimed to be consequence is only fortuity"—the

proximate-cause rule precludes recovery *Sofec*, 517 U S at 838 (quoting *Petition of Kinsman Transit Co*, 328 F 2d 708, 725 (2d Cir 1964))

Thus, for example, "if the [negligent] destruction of the Michigan Avenue Bridge had delayed the arrival of a doctor, with consequent loss of a patient's life," the defendant's negligence would be a "but for" cause of the death but not a proximate cause *Sofec*, 517 U S at 838-839 (quoting *Kinsman Transit*, 328 F 2d at 725) The same would be true in a case in which "the defendant drives through the state of New Jersey at an excessive speed, and arrives in Philadelphia in time for the car to be struck by lightning" that injures the passenger Keeton, *supra*, § 41, at 264

b There is no language in FELA, much less any *express* language, that dispenses with the common-law requirement of proximate cause On the contrary, "FELA sa[ys] nothing * * * about the familiar proximate cause standard" *Sorrell*, 549 U S at 174 (Souter, J , concurring) The court of appeals acknowledged as much, observing that "[p]roximate causation is not explicitly mentioned in the statute" Pet App 35a Under the established interpretive methodology, therefore, proximate causation is a required element of a FELA cause of action

The only language in the Act that addresses causation appears in Section 1, which provides that an employee may recover for an injury "resulting in whole or in part" from the railroad's negligence 45 U S C § 51[4] That language authorizes recovery

[4] Section 3, FELA's comparative-negligence provision, "does not address causation" *Sorrell*, 549 U S at 171

when the railroad's negligence is *one of the causes* of the employee's injury, but it says nothing about the requisite *directness* of a cause, a subject that is consequently governed by the common law. The necessary directness of a cause and multiplicity of causes are distinct concepts in the law of torts, "a given proximate cause," in particular, "need not be, and frequently is not, the exclusive proximate cause of harm." *Sosa* v *Alvarez-Machain*, 542 U. S. 692, 704 (2004). Thus, for example, a railroad's negligence and an employee's negligence can both be proximate causes of an injury when the employee "walk[s] on the tracks" and the railroad "fail[s] to display a light on the train or to give a signal by bell or whistle." Daunis McBride, *Richey's Federal Employers' Liability, Safety Appliance, and Hours of Service Acts* § 66, at 160 (2d ed. 1916). By authorizing an employee to recover for an injury "resulting in whole or in part" from the railroad's negligence, while saying "nothing * * * that expressly alters the standard common law requirement that a negligence plaintiff prove proximate cause," *Raab*, 221 P. 3d at 230, FELA simply makes clear that recovery is allowed when the railroad's negligence is "*a* proximate cause of [the] injury," as opposed to "*the* proximate cause thereof." *Reed* v. *Pa. R. R.*, 171 N. E. 2d 718, 721, n. 3 (Ohio 1961).

Indeed, this Court has already interpreted FELA's "in whole or in part" language as addressing the subject of multiple causes. As the Court explained in *Sorrell*, the words "make clear that there could be recovery against the railroad even if it were only partially negligent" and "reflect the fact that [the employee's] contributory negligence is no longer a complete bar to recovery." *Sorrell*, 549 U. S., at 170-171. Judge Posner said much the same thing

in paraphrasing the three-Justice *Sorrell* concurrence "Congress's * * * purpose in specifying 'in whole or in part' was to make clear that a railroad would be liable if it was negligent even if the injured worker had been much more negligent"—or if there were "joint tortfeasors of unequal responsibility." *Coffey* v *Ne Ill Reg'l Commuter R R*, 479 F 3d 472, 476 (7th Cir 2007)

That reading of FELA follows from the ordinary meaning of the statutory language, which governs when, as here, a term is not defined in the statute See, *e g*, *Hamilton* v *Lanning*, 130 S Ct 2464, 2471 (2010) One need not consult a dictionary to know that the ordinary meaning of the phrases "resulting in whole" and "resulting in * * * part" is just what they say a "whole" and a "part[ial]" cause The language does not speak to whether the whole or partial cause must be a direct one

Sorrell's construction of "in whole or in part" also follows from "the contemporaneous understanding of the term," *Roadway Express, Inc* v *Piper*, 447 U S 752, 759 (1980), which is relevant when, as here, the statute at issue was enacted in an earlier era At the time of FELA's enactment, common-law courts in negligence cases routinely used the formulation "in whole or in part" in tandem with "proximate cause" (typically, though not always, in describing the defense of contributory negligence)[5] That common

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[5] See, *e g*, *St Louis, Iron Mountain & S Ry* v *Coolidge*, 83 S W 333, 334 (Ark 1904) ("[t]he concurring negligence of two parties makes both liable to a third party injured thereby," unless one shows that "its negligence did not produce, in whole or in part, that result which follows naturally and proximately from the negligent act" (internal quotation marks omitted)), *Schneider* v *Mkt St Ry*, 66 P 734, 736 (Cal 1901) (contribu-

usage shows that the term "in whole or in part" in negligence cases was contemporaneously understood to address multiple causation, not the requisite directness of a cause. For if "in whole or in part" had been understood to encompass remote causes, the term could not intelligibly have been used in conjunction with a requirement of "proximate cause."

Any lingering doubt on the point would have to be resolved in favor of the common-law rule, which

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tory negligence is established if "the negligence of the plaintiff was, in whole or in part, the proximate cause of the injury"), *Denver & Rio Grande R R.* v. *Peterson*, 69 P. 578, 579 (Colo. 1902) (plaintiff alleged that defendant's "negligence, either in whole or in part, was the direct and proximate cause of the injury"), *N. Y., Chicago & St. Louis R R.* v. *Perigeux*, 37 N.E. 976, 977 (Ind. 1894) ("Negligence is contributory when, and only when, it directly and proximately induces the injury, in whole or in part." (internal quotation marks omitted)), *Rietveld* v. *Wabash R R.*, 105 N.W. 515, 517 (Iowa 1906) ("the plaintiff's negligence must be such as contributes proximately to his injury, but, if it does so in whole or in part, in any manner or to any degree, there can be no recovery"), *Rostuck* v. *Minneapolis & Pac. Ry.*, 51 N.W. 781, 785 (N.D. 1892) ("Negligence is contributory when, and only when, it directly and proximately induces the injury, in whole or in part."), *Rosevear* v. *Borough of Osceola Mills*, 32 A. 548, 552 (Pa. 1895) (plaintiff "can recover if her present condition, either in whole or in part, is the proximate result of th[e] injury"), *Cooper* v. *Georgia, Carolina & N. Ry.*, 39 S.E. 543, 545 (S.C. 1901) ("contributory negligence must have in it the element of being a proximate cause,—not a remote cause, but a proximate cause from which the accident or injury, in whole or in part, directly and immediately resulted"), *Mayor of City of Knoxville* v. *Cox*, 53 S.W. 734, 735 (Tenn. 1899) (contributory negligence is established if plaintiff's negligence "in the whole or in part proximately occasions the injury"), *Bolin* v. *Chicago, St. Paul, Minneapolis & Omaha Ry.*, 84 N.W. 446, 448 (Wis. 1900) ("a party cannot recover for an injury of which his own negligence was in whole or in part the proximate cause" (internal quotation marks omitted))

can be abrogated only by "express language" in the Act *Sorrell*, 549 U S at 165-166 Whatever else one might think about "in whole or in part," it cannot possibly be said that the language "expressly reject[s]" proximate causation *Gottshall*, 512 U S at 544

B. Proximate Causation Is Required Under This Court's Precedents

Consistent with the established interpretive methodology, this Court has repeatedly held that proximate causation is an element of a FELA claim As the three-Justice concurrence in *Sorrell* explained, moreover, the Court's decision in *Rogers* v *Missouri Pacific Railroad*, 352 U S 500 (1957), did not hold otherwise Nor has any post-*Rogers* decision of this Court

1. This Court has repeatedly held that proximate causation is required

a "[T]hroughout the half-century between FELA's enactment and the decision in *Rogers*," this Court "consistently recognized and applied proximate cause as the proper standard in FELA suits" *Sorrell*, 549 U S at 174 (Souter, J , concurring) The Court not only has recognized and applied the standard, but has stated it in the clearest possible terms "In order to recover under the Federal Employers' Liability Act," the Court has said, "it [i]s incumbent upon [the plaintiff] to prove that [the defendant] was negligent and that such negligence was the proximate cause in whole or in part of the * * * accident" *Tennant* v *Peoria & Pekin Union Ry* , 321 U S 29, 32 (1944) The Court has viewed this requirement as entirely uncontroversial That "the alleged negligence" must

have been "the proximate cause of the damage," the Court has observed, is "the general rule" and "requires no reasoning to demonstrate" *St Louis, Iron Mountain & S Ry* v *McWhirter*, 229 U S 265, 280 (1913) By using the formulation "proximate cause in whole or in part," *Tennant*, 321 U S at 32, moreover, the Court has left no doubt that the statutory term "in whole or in part" refers to multiple causation, not the requisite directness of a cause See also *Del , Lackawanna & W R R* v *Koske*, 279 U S 7, 11 (1929) ("The burden was on plaintiff to * * * show a breach of duty owed by defendant to him * * *, and that in whole or in part his injuries resulted proximately therefrom"), *Reynolds* v *Atl Coast Line R R* , 336 U S 207, 208-209 (1949) (per curiam) (employee must "show that the accident resulted proximately, in whole or in part, from [the railroad's] negligence")

The Court has applied proximate causation in its traditional form, explaining that "negligence * * * is the proximate cause of an injury" when the injury was "the natural and probable consequence of the negligence" *Brady*, 320 U S at 483 (quoting *Kellogg*, 94 U S at 475) The Court has also made clear that mere "but for" causation (or causation "in fact") is not enough Summarizing "[t]he rule clearly deducible" from four prior FELA cases, the Court has explicitly contrasted negligence that is the "proximate cause" of an injury (for which an employee "can recover") with negligence that "merely creates an incidental condition or situation in which the accident * * * results in such injury" (for which an employee "cannot recover") *Davis* v *Wolfe*, 263 U S 239, 243 (1923)

The Court has relied on this distinction between but-for and proximate causation in reversing jury verdicts for FELA plaintiffs In *Lang* v *New York Central Railroad*, 255 U S 455 (1921), for example, the Court held that an injured employee could not recover for the railroad's failure to equip a rail car with automatic couplers, in violation of the Safety Appliance Act "[T]he collision was not the proximate result of the defect," the Court explained, "or, in other words, * * * the collision under the evidence cannot be attributable to a violation of the provisions of the law," even though, "had they been complied with, * * * the collision would not have resulted in injury" *Id* at 461 (internal quotation marks and brackets omitted) Similarly, in *Brady* the Court held that there was insufficient evidence that a defective rail was a proximate cause of the employee's death, explaining "The mere fact that with a sound rail the accident might not have happened is not enough The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events" 320 U S 484 And there are still other FELA cases in which the Court has reversed jury verdicts because of a failure to prove proximate cause [6]

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[6] See, *e g*, *St Louis-San Francisco Ry* v *Mills*, 271 U S 344, 347 (1926) ("Nor is there evidence from which the jury might infer that petitioner's [negligence] was the proximate cause of decedent's death"), *N Y Cent R R* v *Ambrose*, 280 U S 486, 489 (1930) (plaintiff "failed to prove that the accident was proximately due to the negligence of the company"), *Nw Pac R R* v *Bobo*, 290 U S 499, 503 (1934) ("If petitioner was negligent * * *, there is nothing whatsoever to show that this was the proximate cause of the unfortunate death"), see also *Reynolds*, 336 U S at 208-209 ("the facts alleged did not show that the accident resulted proximately, in whole or in part, from [the railroad's] negligence")

Altogether, the Court has applied the proximate-cause standard in more than 20 FELA cases [7]

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[7] In addition to the cases already cited, see *Norfolk & W Ry* v *Earnest*, 229 U S 114, 118-119 (1913) (jury was "rightly" instructed that, "if the said engineer did not exercise * * * reasonable care and caution, and his failure so to do was the proximate cause of the accident, then [you] must find for the plaintiff"), *Spokane & Inland Empire R R* v *Campbell*, 241 U S 497, 510 (1916) ("where * * * plaintiff's contributory negligence and defendant's violation of * * * the Safety Appliance Act are concurring proximate causes, it is plain that [FELA] requires the former to be disregarded"), *Louisville & Nashville R R* v *Layton*, 243 U S 617, 621 (1917) ("carriers are liable to employees in damages whenever the failure to obey these Safety Appliance Laws is the proximate cause of injury"), *Minneapolis, St Paul & Sault Ste Marie Ry* v *Goneau*, 269 U S 406, 410-411 (1926) ("As there was substantial evidence tending to show that the defective coupler was a proximate cause of the accident * * *, the case was rightly submitted to the jury * * * "), *Swinson* v *Chicago, St Paul, Minneapolis & Omaha Ry*, 294 U S 529, 531 (1935) ("The Safety Appliance Act * * * give[s] a right of recovery [under FELA] for every injury the proximate cause of which was a failure to comply with a requirement of the act"), *Brady* v *Terminal R R Ass'n of St Louis*, 303 U S 10, 16 (1938) (plaintiff may recover for violation of Safety Appliance Act "provided the defective equipment is the proximate cause of the injury"), *Tiller* v *Atl Coast Line R R*, 318 U S 54, 67 (1943) (FELA "leave[s] for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury"), *Tiller* v *Atl Coast Line R R*, 323 U S 574, 578 (1945) ("It was for the jury to determine whether the [violation of the Boiler Inspection Act] proximately contributed to the deceased's death"), *Coray* v *S Pac Co*, 335 U S 520, 523 (1949) (plaintiff "was entitled to recover if this defective equipment was the sole or a contributory proximate cause of the decedent employee's death"), *Urie*, 337 U S at 177 (complaint stated claim under FELA because "[a]ll the usual elements [we]re comprehended, including want of due or ordinary care, proximate causation of the injury, and injury"), *O'Donnell* v *Elgin, Joliet & E Ry*, 338 U S 384, 390 (1949) ("a

b The court of appeals recognized that this Court's "[e]arly FELA cases did not interpret the language 'resulting in whole or in part' as altering the common-law requirement of proximate cause" and that "the Court required that the injury be a direct or proximate result of * * * the negligent act[] in order for liability under the FELA to be imposed" Pet App 9a, 11a-12a The court of appeals nevertheless quoted, with apparent approval, a statement in a 1953 law-review article that "such cases are definitely inconsistent with later decisions" of this Court *Id* at 12a (quoting William H DeParcq, *A Decade of Progress Under the Federal Employers' Liability Act*, 18 LAW & CONTEMP PROBS 257, 268 (1953)) That statement is simply incorrect

The decision on which the court of appeals placed particular emphasis is *Coray* v *Southern Pacific Co*, 335 U S 520 (1949) See Pet App 12a-13a, 37a-38a The plaintiff in that case sought recovery on behalf of an employee killed when a one-man flat-top track car on which he was riding crashed into the back of a freight train that stopped suddenly because of a defective brake *Coray*, 335 U S at 521 The trial court directed a verdict for the defendant, and the Utah Supreme Court affirmed *Id* at 522 This Court reversed, holding that there was sufficient evidence for the jury to return a verdict for the plaintiff *Id* at 533-524

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failure of equipment to perform as required by the Safety Appliance Act is * * * an actionable wrong, * * * for the proximate results of which there is liability [under FELA]"), and *Carter* v *Atlanta & St Andrew's Bay Ry*, 338 U S 430, 435 (1949) ("if the jury determines that the defendant's breach is 'a contributory proximate cause' of injury, it may find for the plaintiff")

It is very difficult to see how *Coray* could be viewed as a departure from earlier decisions of this Court. Indeed, it cited two of them—*Spokane & Inland Empire Railroad* v. *Campbell*, 241 U.S. 497 (1916), and *Davis* v. *Wolfe*—for the very proposition that the court of appeals ultimately rejected: that FELA authorizes recovery if the railroad's negligence "was the sole or a contributory proximate cause" of the employee's injury or death. *Coray*, 335 U.S. at 523.

Nor is there any basis for the court of appeals' suggestion that, although *Coray* "employed language of 'proximate cause,' that term did not have the same teeth" that it had in earlier decisions. Pet. App. 15a. *Coray* simply held that a jury could have found proximate causation because the railroad's negligence and the employee's death "were inseparably related to one another in time and space." *Coray*, 335 U.S. at 524. It required no "broaden[ing]" of the concept of proximate cause, Pet. App. 14a, for a jury to find the element satisfied in those circumstances.

In the same discussion, the court of appeals cited this Court's decisions in *Tennant* and *Tiller* v. *Atlantic Coast Line Railroad*, 323 U.S. 574 (1945), apparently because in each case the Court reinstated a jury verdict for the plaintiff. Pet. App. 13a-14a. As in *Coray*, however, the Court did so, not because it believed that proximate causation was unnecessary, but because there was sufficient evidence for the jury to find that element satisfied. See *Tennant*, 321 U.S. at 33 ("The court below erred * * * in holding that there was not sufficient proof to support the charge that [the railroad's] negligence * * * was the proximate cause of Tenant's death."); *Tiller*, 323 U.S. at

578 ("It was for the jury to determine whether the failure to provide this required light on the rear of the locomotive proximately contributed to the deceased's death") It is particularly odd to suggest that this Court somehow moved away from proximate causation in *Tennant*, since, as we have already observed, that case unequivocally stated that, to recover under the Act, it was "incumbent" upon the employee to prove that the railroad's negligence was "the proximate cause in whole or in part" of the accident *Tennant*, 321 U S at 32

2. *Rogers* did not abandon proximate causation

Other federal courts of appeals agree with the court below that this Court's proximate-cause decisions are no longer good law, but take the position that it was *Rogers* that effected the change According to the Tenth Circuit, for example, while it was once "customary for courts to analyze liability under the FELA in terms of proximate causation," this Court "definitively abandoned this approach in *Rogers*" *Summers* v *Mo Pac R R*, 132 F 3d 599, 606 (10th Cir 1997) The Fifth and Ninth Circuits have reached the same conclusion See *Page* v *St Louis Sw Ry*, 312 F 2d 84, 89 (5th Cir 1963) ("[A] definite departure from traditional common-law tests of proximate causation as applied to the Federal Employers' Liability Act came in *Rogers*"), *Oglesby* v *S Pac Transp Co*, 6 F 3d 603, 607 (9th Cir 1993) ("in *Rogers* * * * the Supreme Court indicated that the standard of causation required under the FELA differs from common-law proximate cause") In this case, the Seventh Circuit was more ambivalent about how *Rogers* should be interpreted– it acknowledged, for example, that "Justice Souter's critique of [this] case

law" has "considerable force," Pet App 35a—but ultimately it joined its "sister circuits," *id* at 38a, in holding that common-law proximate causation did not survive *Rogers*

Justice Souter's understanding of *Rogers* is correct, and that of the court of appeals is wrong *Rogers* did not "smuggle[] proximate cause out of * * * FELA" *Sorrell*, 549 U S at 173 n * (Souter, J , concurring) It "did not address, much less alter, existing law governing the degree of causation necessary for redressing negligence," but simply "left this law where it was" *Id* at 173, 174 (Souter, J , concurring) The contrary view reflects a fundamental "misreading of *Rogers*" *Id* at 177 (Souter, J , concurring)

a Even before one undertakes an analysis of what *Rogers* actually said, it bears emphasis that, if the case had in fact held that FELA does not require proof of proximate causation, it would mean that *Rogers* had not only overruled more than 20 of this Court's prior decisions, but had done so *sub silentio* For as the court of appeals recognized, *Rogers* did not "*explicitly* overrul[e] [the] earlier FELA cases that had spoken in terms of common-law proximate cause" Pet App 18a (emphasis added) But "[t]his Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*" *Shalala* v *Ill Council on Long Term Care, Inc*, 529 U S 1, 18 (2000) That is especially true when, as here, the precedent is long-settled, has been repeatedly reaffirmed, and involves an issue of statutory interpretation, where *stare decisis* considerations are strongest See, *e g*, *IBP, Inc* v *Alvarez*, 546 U S 21, 32 (2005) An implicit overruling is even more unlikely when, as here, the Court cited with approval a number of

the decisions it was supposedly discarding. See *infra*, pp. 40-41. And it is more unlikely still when, as here, the Court could silently overrule more than a score of precedents only by "violat[ing] its own interpretive rules" in FELA cases. *Raab*, 221 P.3d at 230.

In analyzing *Rogers*, therefore, one should employ the strongest possible presumption that the case did *not* abandon proximate causation, and the decision should be interpreted, as long as there is any reasonable way to do so, in a manner consistent with the Court's earlier decisions. As explained below, an interpretation of *Rogers* that is consistent with prior decisions on proximate causation—and, not coincidentally, with the established methodology for interpreting FELA—is not only reasonable but manifestly correct. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 98 (1998) (finding it "clear" that a decision "was not meant to overrule, *sub silentio*, two centuries of jurisprudence").

b. "At common law, of course, a plaintiff's contributory negligence operated as an absolute bar to relief." *Sorrell*, 549 U.S. at 166. FELA abolished that defense, replacing it with the doctrine of comparative negligence. See 45 U.S.C. §§ 51, 53. *Rogers* concerned that doctrine, and—as the court of appeals itself acknowledged—"multiple causes" more generally. Pet. App. 35a-36a; see also *Marazzato v. Burlington N. R.R.*, 817 P.2d 672, 674 (Mont. 1991) ("the *Rogers* case was addressing the issues of multiple causes and contributory negligence"). *Rogers* did not address the requisite directness of a cause.

At the time he was injured, the plaintiff in *Rogers* was burning vegetation along a railroad track with a torch. *Rogers*, 352 U.S. at 502. When a train

approached, he turned off the torch and ran away from the train, up a path to a location near a culvert *Ibid* As the train passed, it fanned the flames of the burning vegetation, and the plaintiff became enveloped in them *Ibid* Retreating backwards, he slipped and fell from the top of the culvert, suffering the injuries for which he sued *Ibid* The jury returned a verdict for the plaintiff, but the Supreme Court of Missouri reversed, on the ground that the evidence did not support the verdict *Id* at 501 This Court in turn reversed, holding that "the evidence was sufficient to support the jury finding" *Id* at 503

This Court understood the Missouri Supreme Court to have ruled that, as a matter of law, the plaintiff's negligence was the "sole cause" of his injury *Rogers*, 352 U S at 504 In rejecting that ruling, this Court determined that, while it might be that "the jury could properly have reached [that] conclusion," the evidence "also supported with reason [a] verdict favorable to the [plaintiff]," and so "the decision was exclusively for the jury to make" *Ibid* The Court explained that, because the jury was instructed to return a verdict for the defendant if it found that the plaintiff's negligence was the "sole cause" of his injury, and because it returned a verdict for the plaintiff, the jury must have found "that such was not the case but that [the plaintiff's] injury resulted *at least in part* from the [defendant's] negligence" *Id* at 504-505 (emphasis added) By explicitly contrasting an injury of which the plaintiff's negligence was the "sole" cause with one of which the railroad's negligence was a cause "in part," the Court was necessarily saying that the plaintiff was entitled to recover because there was sufficient evidence that

the railroad's negligence was *one of the causes* of his injury—not that recovery was permitted because a jury could find that it was at least a *remote* (as opposed to a direct) cause

The Court thought that it was also possible to read the Missouri Supreme Court's decision another way—as saying that the railroad was entitled to judgment, not because its negligence was *no* cause of Rogers' injury, but because its negligence was only a *partial* cause The lower court implied the latter view, this Court said, by using "language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the *sole*, efficient, producing cause of injury" *Rogers*, 352 U S at 506 (emphasis added) As Justice Souter explained in *Sorrell*, the Court rejected this language, not because it was language of proximate cause, but because it was language of "*exclusive* proximate cause," a concept that "undermined Congress's chosen scheme of comparative negligence by effectively reviving the old rule of contributory negligence as barring any relief" *Sorrell*, 549 U S at 175 (Souter, J , concurring) (emphasis added)

In explaining why that concept is wrong, the Court in *Rogers* employed a phrase that, more than any other language in the opinion, has led some lower courts to conclude that *Rogers* discarded proximate causation Under FELA, the Court said, "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played *any part, even the slightest*, in producing the injury or death for which damages are sought" *Rogers*, 352 U S at 506 (emphasis added)

But that language "spoke to apportioning liability among parties, each of whom * * * had some hand in causing damage," such that "there are multiple cognizable causes of [the] injury" *Sorrell*, 549 U S at 175, 173 (Souter, J , concurring) It did not address "the necessary directness of cognizable causation" *Id* at 175 (Souter, J , concurring) This understanding of *Rogers*' language is confirmed by the sentence that immediately follows "It does not matter that * * * the jury may also * * * attribute the result to *other causes, including the employee's contributory negligence*" *Rogers*, 352 U S at 506 (emphasis added)

The Court's opinion in *Rogers* went on to employ a number of variants of the "any part, even the slightest" formulation It said that an employee may recover under FELA if the railroad's negligence played "any part," "any part at all," or "any part, however small," in the employee's injury *Rogers*, 352 U S at 509, 507, 508 Each of the variants, like the formulation itself, is ultimately an interpretation of the statutory language, which *Rogers* quoted in discussing why "sole" proximate causation is not the correct standard "The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence" *Id* at 507 (quoting 45 U S C § 51) All that *Rogers* did was confirm that the statutory language italicized in the opinion—"in part"—means in "*any* part" The language in the statute addresses multiple causation, not proximate causation, see *supra*, pp 23-27, and so does the language in *Rogers* that construes it

In her opinion concurring in the judgment in *Sorrell*, Justice Ginsburg expressed the view that,

while "it is sometimes said that *Rogers* eliminated proximate cause in FELA actions[,] * * * [i]t would be more accurate * * * to recognize that *Rogers* describes the test for proximate causation applicable in FELA suits" *Sorrell*, 549 U S at 178 (Ginsburg, J , concurring in the judgment) "That test," Justice Ginsburg said, "is whether 'employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought'" *Ibid* (quoting *Rogers*, 352 U S at 506) The court of appeals apparently endorsed this position, when it said that *Rogers* adopted a "new conception of proximate cause" Pet App 15a But the oft-quoted language in *Rogers*—"any part, even the slightest"—cannot be the test of proximate causation For the reasons explained above, that phrase simply does not address the requisite directness of a cause *Rogers*' language, moreover, could not plausibly be understood as a *description* of proximate cause, because it would not differ in any respect from but-for cause—and therefore would wholly eliminate the concept of proximate cause from the statute

c Far from having rejected traditional proximate causation, *Rogers* assumed that FELA requires it That is true in at least four respects

First, the trial court's charge in *Rogers* "covered the requirement to show proximate cause connecting negligence and harm" *Sorrell*, 549 U S at 176 (Souter, J , concurring) In language quoted by this Court, the trial court instructed the jury to return a verdict for the railroad if the employee's negligence was the "sole proximate cause" of his injuries and the injuries were not "directly contributed to or caused" by the railroad's negligence *Rogers*, 352 U S at 505

n 9 That aspect of the instruction was "free of controversy" and one with which the Court "took no issue." *Sorrell*, 549 U S at 176 (Souter, J , concurring) Indeed, in sustaining the jury's finding of liability, the Court assumed that "the verdict was obedient to the trial judge's charge " *Rogers*, 352 U S at 505

Second, the plaintiff in *Rogers* did not ask this Court to abandon proximate causation On the contrary, Rogers sought reversal of the Missouri Supreme Court's decision, and reinstatement of the jury's verdict, on the ground that he had "sustained injuries as a proximate result of [the railroad's] negligence" and that its negligence "was clearly the proximate cause of [his] injury " Brief for Petitioner at 19, 12, *Rogers* v *Mo Pac R R*, 352 U S 500 (1957) (No 28), *available at* 1956 WL 89025 Indeed, one of the points in the Argument section of Rogers' brief was headed "Respondent's Negligence Was the Proximate Cause of Petitioner's Injury Under the Federal Employers' Liability Act " *Id* at 24 And the complaint that Rogers filed in the trial court, which he quoted in his brief, alleged that his injury had "directly and proximately resulted, in whole or in part, from the negligence of the defendant " *Id* at 9 That is the same formulation that appears in common-law decisions of state courts and FELA decisions of this Court It recognizes that the Act authorizes recovery when the railroad's negligence was only one of the causes of the employee's injury ("in whole or in part") but that that cause must be a proximate one ("directly and proximately")

Third, "[t]he absence of any intent to water down the common law requirement of proximate cause is

evident from the prior cases on which *Rogers* relied." *Sorrell*, 549 U S at 175 (Souter, J , concurring) No fewer than three of the cases that *Rogers* cited in support of the principle that the railroad's negligence need only have played "any part" in the employee's injury "unambiguously recognized proximate cause as the standard applicable in FELA suits" *Id* at 175-176 (Souter, J , concurring) Thus, for the proposition that the test under the Act is whether the railroad's negligence "played any part, even the slightest," in producing the injury, the Court cited *Coray*, which states that an employee may recover if the railroad's negligence was "the sole or a contributory proximate cause" of the injury *Rogers*, 352 U S at 506 & n 11, *Coray*, 335 U S at 523 For the proposition that the inquiry in a FELA case is whether a jury may reasonably find that the railroad's negligence "played any part at all" in the injury, the Court cited *Carter* v *Atlanta & St Andrews Bay Railway*, 338 U S 430 (1949), which states that a jury may find for the employee if it determines that the railroad's negligence is "a contributory proximate cause" of the injury *Rogers*, 352 U S at 507 & n 13, *Carter*, 338 U S at 435 And for the proposition that, "for practical purposes," the only question in a FELA case is whether the railroad's negligence "played any part, however small," in the injury, the Court cited *Tiller* v *Atlantic Coast Line Railroad*, 318 U S 54 (1943), which states that the Act "leave[s] for practical purposes" only the question whether the railroad's negligence was "the proximate cause" of the injury *Rogers*, 352 U S at 508 & n 16, *Tiller*, 318 U S at 67

Fourth, the dissenting Justices in *Rogers* understood the case as one in which the Court

applied settled legal principles to a unique set of facts, not one in which the Court established a new rule of causation Adhering to his usual practice in fact-bound FELA cases, Justice Frankfurter would have dismissed the writ of certiorari as improvidently granted, because "the sole issue" in *Rogers* was "the sufficiency of the evidence," the Court "merely reviewed evidence that had already been reviewed by two lower courts," and the Missouri Supreme Court simply "found that there was not evidence to bring the[] case[] within the recognized rules for submitting a case to the jury" *Ferguson* v *Moore-McCormack Lines, Inc*, 352 U S 521, 525, 537, 541 (1957) (Frankfurter, J, dissenting) Justice Harlan, one of the other two dissenters, would have affirmed on the merits, but for a reason similar to that expressed by Justice Frankfurter that "all this Court has done" in *Rogers* "is to substitute its views on the evidence for those of the Missouri Supreme Court" *Id* at 562 (opinion of Harlan, J)[8] The dissenting Justices' view of *Rogers* as a fact-bound case applying settled law is consistent with the Court's own explanation of why it granted certiorari "to consider * * * whether the decision [below] invaded the jury's function" *Rogers*, 352 U S at 501

For these reasons, *Rogers* is "no authority for anything less than proximate causation in an action under FELA" *Sorrell*, 549 U S at 177 (Souter, J, concurring) Consistent with common-law principles as qualified by the statutory language ("in whole or in part"), the holding of the case is not that the

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[8] The third dissenter, Justice Reed, did not explain the reasons for his vote See *Rogers*, 352 U S at 511 (Reed, J, dissenting)

railroad's negligence need not be a proximate cause of the employee's injury, but that it need not be the *sole* proximate cause

3. None of this Court's post-*Rogers* decisions abandoned proximate causation

a In holding that FELA does not require proximate cause, the court of appeals relied on post-*Rogers* decisions of this Court that, according to the court of appeals, "attributed to *Rogers* the idea that the FELA incorporates a causation standard less stringent than proximate cause" Pet App 19a The court of appeals believed that it was "not free to ignore" these decisions, *id* at 37a, and placed particular emphasis on two of them *Crane* v *Cedar Rapids & Iowa City Railway*, 395 U S 164 (1969), and *Gottshall* See Pet App 19a-21a, 37a-38a But neither *Crane* nor *Gottshall* held that FELA abandoned proximate cause

In *Crane*, the Court cited *Rogers* for the proposition that a FELA plaintiff "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's [negligence]" 395 U S at 166 That statement is dictum, because the suit against the railroad was filed by a non-employee, and thus the issue of causation was governed by state law rather than FELA *Id* at 166-167 In any event, the statement is properly read to mean only that FELA rejects "[t]he notion that proximate cause must be *exclusive* proximate cause" and does not embody "the old rule of contributory negligence," *Sorrell*, 549 U S at 175 (Souter, J , concurring) (emphasis added), as *Rogers* held and as *Crane*'s quotation of the statute's "in whole or in part" language confirms

In *Gottshall*, the Court cited *Rogers* for the proposition that "a relaxed standard of causation applies under FELA" 512 U S at 543 That statement, too, is dictum, because *Gottshall* involved an issue—the standard for negligent infliction of emotional distress—that did not require the Court to express a view on causation In any event, the illustrative language that immediately followed the "relaxed standard" statement—the quotation from *Rogers* that the employer's negligence need only have "played any part, even the slightest, in producing the injury," *ibid* (quoting 352 U S at 506)—shows that the statement is consistent with the proper understanding of *Rogers* (*i e*, that it is a case about multiple causes)

Gottshall is especially dubious authority for the argument that FELA does not require proof of proximate cause given that the decision, as the court of appeals recognized, "reiterates the importance of common-law principles in interpreting the FELA" Pet App 20a-21a In particular, *Gottshall* says that, unless "common-law principles * * * are expressly rejected in the text of the statute, they are entitled to great weight" and that, "[b]ecause FELA is silent on the issue of negligent infliction of emotional distress, common-law principles must play a significant role in [the Court's] decision" *Gottshall*, 512 U S at 544 Precisely the same is true of proximate causation

The court of appeals recognized that the statements in *Crane* and *Gottshall* are dicta, but believed that they are nevertheless entitled to "great respect" Pet App 37a Earlier *holdings* that FELA requires proof of proximate cause, however, control over later dicta, see *Honda Motor Co* v *Oberg*, 512 U S 415, 428 (1994), and, in any event, the dicta can

be reconciled with the holdings, for the reasons explained above

b This Court has not had occasion to apply the proximate-cause standard in any post-*Rogers* case, presumably because it has abandoned its practice of granting certiorari in large numbers of fact-bound FELA cases See *Ferguson*, 352 U S at 548-558 (Frankfurter, J , dissenting) (listing Court's "decisions relating to sufficiency of the evidence" under FELA between 1911 and 1956) In keeping with this Court's pre-*Rogers* decisions, however, at least eight state courts of last resort have concluded in post-*Rogers* cases that FELA requires proximate cause [9]

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[9] See *CSX Transp , Inc* v *Miller*, 46 So 3d 434, 450 (Ala 2010) ("the jury in this case was properly instructed by the trial court that Miller could not be compensated for any injury not proximately caused by CSX's negligence"), *Snipes* v *Chicago, Cent & Pac R R* , 484 N W 2d 162, 164 (Iowa 1992) ("Recovery under the FELA requires an injured employee to prove that the defendant employer was negligent and that the negligence proximately caused, in whole or in part, the accident " (citing *Tennant*)), *Brabeck* v *Chicago & Nw Ry* , 117 N W 2d 921, 923 (Minn 1962) ("violation of an operating rule may impose liability on an employer if it is the proximate cause of the accident" (citing *Tennant*)), *Marazzato*, 817 P 2d at 675 ("The plaintiff has the burden of proving that defendant's negligence was the proximate cause in whole or in part of plaintiff's [death] "), *Ballard* v *Union Pac R R* , 781 N W 2d 47, 53 (Neb 2010) ("to recover under FELA, an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury"), *Reed*, 171 N E 2d at 721 n 3 ("In order to support recovery [under FELA] * * *, a violation of the Federal Safety Appliance Act * * * must amount to *a* proximate cause of [the] injury although it need not be *the* proximate cause thereof " (citing *Carter* and *Davis* v *Wolfe*)), *Raab*, 221 P 3d at 225 (declining to "read[] *Rogers* as eliminating the

The court below believed that "every [federal] court of appeals" has reached the contrary conclusion post-*Rogers*, Pet App 23a, but that is not correct To begin with, the First Circuit determined that FELA requires proximate causation in a post-*Rogers* case See *Boston & Me R R* v *Talbert*, 360 F 2d 286, 288 (1st Cir 1966) ("the plaintiff has the burden of proving negligence and proximate cause") In addition, many of the court of appeals decisions cited by the court below, like this Court's decision in *Gottshall*, merely stated that FELA employs a "relaxed" standard of causation, without discussing (or even mentioning) proximate cause See Pet App 23a-25a Like *Gottshall*, those decisions are best understood as referring to *Rogers*' holding that FELA allows recovery even when the railroad bears only a small proportion of responsibility for the employee's injury If they meant to say that FELA does not require proof of proximate cause, however, the decisions—like those of the federal courts of appeals that clearly *did* say that, see *id* at 25a-26a—are inconsistent with the settled interpretive methodology and this Court's precedents, and are therefore incorrect In that connection, it bears emphasis that none of the federal court of appeals decisions cited by the court below considered the possibility that *Rogers* addressed multiple rather than proximate causation, and that none went any deeper in its analysis of *Rogers* than quoting that

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common law proximate cause requirement"), *Gardner* v *CSX Transp , Inc* , 498 S E 2d 473, 483 (W Va 1997) ("[T]o prevail on a claim under [FELA], a plaintiff employee must establish that the defendant employer acted negligently and that such negligence contributed proximately, in whole or in part, to plaintiff's injury ")

decision's somewhat opaque "any part, even the slightest" language

c Some who argue that FELA should not be interpreted to require proof of proximate causation take the position that the concept has somehow become "obsolete," DeParcq, *supra*, at 270, a relic of a bygone era That position is unsustainable

For one thing, in the absence of amendment by Congress, the meaning of a statute cannot change over time Soon after FELA's enactment, and for the next several decades, this Court unequivocally interpreted the Act to require proof of proximate causation For another, while this Court has not directly addressed the issue of proximate causation in any recent FELA case, over the last three decades it has squarely held that *other* statutes that authorize private parties to recover for injuries resulting from tortious conduct—the antitrust, RICO, and securities statutes—require proof of proximate cause As with FELA, none of those statutes explicitly mentions proximate causation See 15 U S C § 15(a) (antitrust), 18 U S C § 1964(c) (RICO), 15 U S C § 78j(b) (securities) Yet as with FELA, this Court has construed the statutes to incorporate common-law principles

Thus, in interpreting the Clayton Act, the Court has held that Congress "assumed that antitrust damages litigation would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation," including "proximate cause" *Associated Gen Contractors*, 459 U S at 532-533 In interpreting RICO, the Court has held that Congress "modeled" RICO's civil-action provision "on the civil-action provision * * * of the Clayton Act", that "a plaintiff's right to sue under [the latter] re-

quire[s] a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well", and that "[p]roximate cause is thus required" under RICO too *Holmes*, 503 U S at 267-268 And in interpreting the Securities Exchange Act of 1934, the Court has held that, "[g]iven the common-law roots of the securities fraud action," a plaintiff "need[s] to prove proximate causation" *Dura Pharm , Inc* v *Broudo*, 544 U S 336, 344 (2005) Even if the Court had not already resolved the question, there would be no basis for a different result under FELA

C. Neither FELA's Remedial Purpose Nor Post-*Rogers* Congressional Inaction Supports The View That FELA Does Not Require Proximate Causation

In holding that FELA does not require proof of proximate causation, the court of appeals relied, in part, on the Act's remedial purpose and on post-*Rogers* congressional inaction Neither supports the court's holding

1. FELA's remedial purpose does not support the court of appeals' decision

In aligning itself with lower courts that interpret *Rogers* to have "relaxed the proximate cause requirement," Pet App 23a, the court of appeals adverted to FELA's remedial purpose The court stated that it had "employed language" in prior decisions that "strongly suggests that traditional formulations of proximate cause have no role in FELA cases" *Id* at 22a The language the court quoted from those decisions includes the observations that the Act was meant "to provide a

broad remedial framework for railroad workers" and "to offer [them] broad remedial relief" *Id* at 22a-23a (quoting *Lisek* v *Norfolk & W Ry*, 30 F 3d 823, 831 (7th Cir 1994), and *Holbrook* v *Norfolk S Ry*, 414 F 3d 739, 741 (7th Cir 2005)) Others have likewise justified their conclusion that FELA does not require a plaintiff to prove traditional proximate causation by invoking the statute's remedial purpose See, *e g*, *Sorrell*, 549 U S at 178-179 (Ginsburg, J, concurring in the judgment), Charles H Traeger, III, *Legal Cause, Proximate Cause, and Comparative Negligence in the FELA*, 18 STAN L REV 929, 932-933 (1966), cited in Pet App 15a (decision below)

This Court, however, rejected the very same theory in *Sorrell* In arguing that FELA creates a less stringent standard of causation for the defendant's negligence than for the plaintiff's contributory negligence, the plaintiff in *Sorrell* likewise invoked FELA's "remedial purpose" 549 U S at 171 The Court was "not persuaded" *Ibid* While acknowledging that FELA "was indeed enacted to benefit railroad employees"—"as the express abrogation of [certain] common-law defenses * * * make[s] clear"—the Court explained that it nevertheless "does not follow * * * that this remedial purpose requires [the Court] to interpret every uncertainty in the Act in favor of employees" *Ibid* The Court went on to say that "FELA's text does not support the proposition that Congress meant to take the unusual step of applying different causation standards" and that "the statute's remedial purpose cannot compensate for the lack of a statutory basis" *Ibid* The Court therefore held that "FELA does not abrogate the common-law approach" *Ibid*

So too here Indeed, this Court has held that RICO requires proof of proximate cause despite "the congressional admonition that RICO be 'liberally construed to effectuate its remedial purposes'" *Holmes*, 503 U S at 274 (quoting Racketeer Influenced and Corrupt Organizations Act, Pub L No 91-452, tit IX, § 904(a), 84 Stat 941, 947 (1970)) It has held that the Clayton Act requires proof of proximate cause over the objection that that statute's civil-enforcement provision "reflects Congress' 'expansive remedial purpose'" *Associated Gen Contractors*, 459 U S at 546 (Marshall, J, dissenting) (quoting *Blue Shield of Va* v *McCready*, 457 U S 465, 472 (1982)) And it has held that the Securities Exchange Act of 1934 requires proof of proximate cause even though the Court previously recognized the securities laws' "broad remedial purposes" *Herman & MacLean* v *Huddleston*, 459 U S 375, 386 (1983) Especially in light of *Sorrell*, FELA cannot be interpreted differently

It would be particularly odd to reject a rule of proximate causation on the basis of FELA's remedial purpose, inasmuch as the rule does not invariably favor the railroad Because FELA adopts a regime of comparative negligence, and because *Sorrell* holds that the causation standard for the employee's contributory negligence is the same as that for the railroad's negligence, requiring proximate causation means that damages will be reduced only when the employee's negligence is a proximate cause of the injury Under the court of appeals' rule, in contrast, damages will be reduced whenever the employee's negligence is a mere but-for cause of the injury In this respect (though not, of course, in all respects), a rule of proximate causation actually *furthers* FELA's remedial purpose

2. Congressional inaction does not support the court of appeals' decision

The court of appeals also believed that "[c]ongressional inaction, in the wake of *Rogers* and circuit law broadly interpreting *Rogers*, counsels against adopting a common-law formulation of [proximate] cause in FELA cases." Pet App 38a-39a. But "congressional inaction * * * 'deserve[s] little weight in the interpretive process,'" particularly "when, as here, Congress has not comprehensively revised [the] statutory scheme." *Alexander* v *Sandoval*, 532 U.S. 275, 292 (2001) (quoting *Cent. Bank of Denver, N.A.* v *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994)). In any event, this Court's only square holdings on point are that FELA requires proof of proximate cause, and there is no consensus in the lower courts on that issue. If anything is to be inferred from the fact that Congress "has not seen fit to amend the FELA to clarify or correct the standard of causation," Pet. App. 39a, therefore, it is that Congress does not disapprove of this Court's *holdings*.

The more relevant question is what the Congress that *enacted* FELA intended. Insofar as any legislative history bears upon *that* question, it shows that that Congress intended to abrogate only the four common-law rules that are specifically abolished in the statute. See 45 U.S.C. §§ 51, 53-55. The Senate Report states that "[t]he proposed measure * * * revises the law as now administered in the courts of the United States in four important particulars" by abandoning the "doctrine of fellow-servants," the "rule of law which presumes that a workman * * *

assume[s] the risks incident to * * * his employment," and "contributory negligence", and by prohibiting "contracts made by a workman limiting or relieving the employer's liability for negligence" S Rep No 60-460, at 1-3 (1908) The House Report likewise states that "[t]he purpose of this bill is to change the common-law liability of employers * * * in these particulars" H R Rep No 60-1386, at 1 (1908) The entirety of each report is devoted to a discussion of the four changes See S Rep No 60-460, at 1-3, H R Rep No 60-1386, at 1-8 [10] The fact that "Congress did not deal at all with the equally well-established doctrine" of proximate causation—either in the legislative reports or in the statute itself—shows that it did not "intend[] to abrogate that doctrine *sub silentio*" *Monessen Sw Ry*, 486 U S at 337-338

The legislative history is thus consistent with the established interpretive methodology and this Court's precedents, both of which compel the conclusion that FELA requires proof of proximate causation

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[10] When FELA was enacted in 1908, it abolished the defense of assumption of risk only in cases in which the railroad's negligence was established by a violation of a safety statute A 1939 amendment abolished the defense in all cases *See Tiller*, 318 U S at 70-71 (Frankfurter, J , concurring)

CONCLUSION

The judgment of the court of appeals should be reversed

Respectfully submitted

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APPENDIX

The Federal Employer's Liability Act, 45 U S C §§ 51-60, provides as follows

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce, or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter

§ 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment

§ 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of

any statute enacted for the safety of employees contributed to the injury or death of such employee

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee

§ 54a. Certain Federal and State regulations deemed statutory authority

A regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of Title 49, or by a State agency that is participating in investigative and surveillance activities under section 20105 of Title 49 is deemed to be a statute under sections 53 and 54 of this title

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contri-

buted or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought

§ 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States

§ 57. Who included in term "common carrier"

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier

§ 58. Duty or liability of common carriers and rights of employees under other acts not impaired

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress

§ 59. Survival of right of action of person injured

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury

§ 60. Penalty for suppression of voluntary information incident to accidents; separability

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense *Provided*, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports

If any provision of this chapter is declared unconstitutional or the applicability thereof to any per-

son or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby

RESPONDENT'S BRIEF

No. 10-235

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Petitioner,

v.

ROBERT McBRIDE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Section 1 of the Federal Employers' Liability Act ("FELA") allows rail workers to recover for injuries or death "resulting in whole or in part from" their employers' negligence. 45 U.S.C. § 51. This case presents the following question:

Whether, as this Court has held repeatedly for more than 50 years, FELA § 1 enacted a uniform, relaxed causation standard distinct from the various standards of common-law "proximate cause" that courts had inconsistently applied in pre-FELA negligence cases.

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INTRODUCTION

Congress enacted the Federal Employers' Liability Act ("FELA") in 1908 to provide a uniform national negligence cause of action for rail workers against their employers. FELA abrogated certain common-law doctrines that had restricted an injured employee's ability to recover damages, such as when a fellow worker contributed to the negligence (the "fellow servant rule"), the employee himself was negligent ("contributory negligence"), or the worker assumed the risk of injury ("assumption of the risk"). For causation, Congress used special words to create a governing standard: "injury or death *resulting in whole or in part from* the negligence" of the railroad or its agents. 45 U.S.C. § 51 (emphasis added).

In both 1908 and the century that followed, courts were unable to agree on the meaning of "proximate cause" in tort cases. That disagreement reflects competing legal policy judgments as to when acts traceable to a defendant's misconduct nonetheless should not be redressable in a negligence action by an injured plaintiff. During that period of ferment for the law of torts, this Court has accommodated the idea of "proximate cause" under FELA by tying it to the words of causation explicitly chosen by Congress —"resulting in whole or in part from." Those words have no common-law antecedent and, indeed, represent a significant departure from any of the proximate-cause formulations advanced by various courts in the years before (and after) FELA's enactment. In the decades since this Court's seminal decision in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), definitively resolved FELA's causation standard, every federal and virtually every state jurisdiction has implemented *Rogers* in the same

manner in its jury instructions. Congress has not made any change to the causation language in FELA in response to that judicial consensus.

In this case, petitioner CSX seeks to upset decades of settled law on the proper jury instructions on causation in a FELA case. Petitioner asks this Court to hold that the jury instructions given in respondent's case were deficient because they did not require a finding of "proximate cause." Notably, petitioner concedes that it asks the Court not to adopt any precise formulation for "proximate cause" under FELA but rather to leave the lower courts to figure out which among the many different tests used in common-law cases is the proper one. If accepted by this Court, that approach would open thousands of cases to appellate litigation over which proximate-cause instruction best comports with Congress's intent, notwithstanding the lack of a settled common-law proximate-cause standard and Congress's decision not to incorporate any of the prevailing formulations. Given the conceptual difficulties inherent in proximate cause as a judge-made legal policy limitation, such an endeavor is bound to create confusion and disuniformity where none currently exists.

This Court should reject CSX's invitation to alter settled law so dramatically. *Rogers* has proved a stable precedent. Petitioner can point to no cases decided under the settled pattern FELA instruction—which borrows from the plain language of FELA and this Court's *Rogers* decision—that are so far outside the bounds of reasonableness that some extra-strength common-law notion of proximate cause should operate to limit liability in those rare instances. In this case, the jury attributed responsibility to both the railroad and the worker in precisely the manner

contemplated by Congress a century ago. That judgment should be upheld.

STATEMENT

Background of FELA

Congress enacted FELA "to change the common-law liability of employers of labor in this line of commerce, for personal injuries received by employees." H.R. Rep. No. 60-1386, at 1 (1908). At that time, "railroads were the largest employer in the United States." U.S. General Accounting Office, *Federal Employers' Liability Act: Issues Associated With Changing How Railroad Work-Related Injuries Are Compensated* 13 (Aug. 1996) ("*GAO Report*"). They were also among the most dangerous, just as they are today: "[i]n 1888 the odds against a railroad brakeman's dying a natural death were almost four to one," and "the average life expectancy of a switchman in 1893 was seven years." *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 3 (1964); *see* Dino Drudi, *Railroad-Related Work Injury Fatalities*, Monthly Lab. Rev., July/Aug. 2007, at 17 (noting that the railroad industry has a "fatal injury rate more than twice the all-industry rate"). In the late nineteenth century, President Harrison compared the plight of the railroad worker to that of "a soldier in time of war" and called it "a reproach to our civilization" that rail workers were "subjected to [such] peril of life and limb." *Johnson v. Southern Pac. Co.*, 196 U.S. 1, 19 (1904).

Congress responded with legislation that overturned harsh judge-made limitations on common-law negligence liability that routinely resulted in denying recovery to employees for railroads' failure to exercise ordinary care. FELA imposed a new statutory framework that was intended not only to compensate

injured rail workers, but also to induce self-regulation by the railroads. *See* S. Rep. No. 60-460, at 2 (1908) (indicating that FELA was designed "to allow the burden of accident and misfortune to fall, not upon a single helpless family, but upon the business in which the workman is engaged"); *Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930) (FELA "is intended to stimulate carriers to greater diligence for the safety of their employees and of the persons and property of their patrons").[1]

FELA contains three principal provisions that overrode pre-existing common-law rules.

First, FELA supplanted the common-law contributory-negligence doctrine, under which a plaintiff's negligence operated as a complete bar to recovery, even if the defendant was also negligent, and instead provided that the employee's recovery would be reduced in proportion to his negligence. *See* 45 U.S.C. § 53; S. Rep. No. 60-460, at 2 ("It is the purpose of this measure to modify the law of contributory negligence.").

Second, FELA eliminated the railroads' common-law defense of "assumption of the risk." 45 U.S.C. § 54.[2] Employers may no longer avoid liability on the

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[1] Congress subsequently has reiterated its "clear intent, encouragement, and dedication . . . to the furtherance of the highest degree of safety in railroad transportation." 49 U.S.C. § 103(e).

[2] FELA originally eliminated that defense only "where the violation . . . of any statute enacted for the safety of employees contributed to the injury or death of such employee." Act of Apr. 22, 1908, ch. 149, § 3, 35 Stat. 65, 66. In 1939, Congress completely eliminated the assumption-of-the-risk defense by precluding its application "in any case where [the] injury or death resulted in whole or in part from the negligence of" the railroad's agents. Act of Aug. 11, 1939, ch. 685, § 1, 53 Stat. 1404, 1404.

ground that unsafe work conditions were known to their injured employees.

Third, FELA § 1 provided for recovery by rail workers for any "injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51. That section is significant in two respects: (1) it abrogated the common-law fellow servant rule, under which employers were not liable "for injuries sustained by one employee through the negligence of a coemployee," S. Rep. No. 60-460, at 1, and (2) it specified the FELA causation standard by providing that employees can recover for any injury or death "resulting in whole or in part from" the negligence of the railroad or its agents.

"Proximate Causation" in Pre-FELA Negligence Law

When Congress enacted FELA's causation standard, it legislated at the apex of judicial and scholarly disagreement about the causal link required for a plaintiff to recover in tort for damages produced by another's negligence.[3] Although judges and scholars used "proximate cause" as a generic legal term for a sufficient causal nexus, that superficial consensus belied pervasive conceptual uncertainty and inconsistent judicial application.[4] For example, one treatise

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[3] *See, e.g.*, Jeremiah Smith, *Legal Cause in Actions of Tort* (I and II), 25 Harv. L. Rev. 103, 223 (1911); Joseph W. Bingham, *Some Suggestions Concerning "Legal Cause" at Common Law* (I and II), 9 Colum. L. Rev. 16, 136 (1909); Francis H. Bohlen, *The Probable or the Natural Consequence as the Test of Liability in Negligence* (I and II), 49 Am. L. Reg. 79, 148 (1901).

[4] *See, e.g.*, *Ehrgott v. City of New York*, 96 N.Y. 264, 280 (1884) ("These various modes of stating the rule are all apt to be misleading, and in most cases are absolutely worthless as guides to the jury."); 1 Thomas G. Shearman & Amasa A. Red-

observed "great confusion as to the test to be applied in determining whether defendant's wrong is the legal cause of plaintiff's ensuing injury." Francis M. Burdick, *The Law of Torts* 32 (4th ed. 1926). In 1929, the Connecticut Supreme Court remarked:

> Few subjects in the law in the past 30 years have been written upon more extensively by the greatest thinkers in the field of torts than that of "Proximate Cause." These writers differ widely in their reasoning and conclusions, but are in agreement in the conclusion that judicial reasoning and discussion of this subject has left our law in a most uncertain and unsound condition.

Mahoney v. Beatman, 147 A. 762, 764-65 (Conn. 1929).

In their struggle to define "proximate cause," judges and scholars articulated widely differing formulations for the causal link necessary for recovery in negligence. Burdick saw the "broad cleavage" as being "between those who would make one liable when his wrong is the 'direct' cause of another's harm, and those who would make foreseeability the test of liability for wrongful acts and omissions." Burdick at 32. Another treatise saw the division as between cases holding a defendant responsible for foreseeable damages, for "all damages which do in fact result from his wrongful acts," or for "damage as is known by common experience to usually follow such a wrongful act." 1 Shearman & Redfield at 29-

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field, *A Treatise on the Law of Negligence* 30-31 (5th ed. 1888) ("So much difficulty, indeed, has been felt in attempting to lay down a rule to cover all possible cases, that some of the ablest judges have declined to state any fixed rule, and have indicated a disposition to leave all doubtful cases to the jury.") (footnote omitted).

30 (citing cases). Writing in 1911, Jeremiah Smith identified at least five different theories of causation:

(1) "Lord Bacon's maxim," *in jure non remota causa, sed proxima, spectatur*, which attempts to distinguish an immediate cause from a remote cause;[5]

(2) "The But for Rule," under which "a defendant is not liable, unless it be true that, but for his tortious act, the damage would not have happened";[6]

(3) The test that attempts to distinguish "between a cause and a condition";[7]

(4) The "Last (or Nearest) Wrongdoer Rule," which posits that "[t]he legal cause is the last (or nearest) culpable human actor to be found in the chain of antecedents";[8] and

(5) "The Probable Consequence Rule," under which "a wrongdoer is liable for probable consequences only."[9]

25 Harv. L. Rev. at 106, 108-11, 114. Finding none of these tests satisfactory, Smith proposed a sixth—the

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[5] *See W.K. Niver Coal Co. v. Cheronea S.S. Co.*, 142 F. 402, 409-10 (1st Cir. 1905); *Louisville, N.A. & C. Ry. Co. v. Nitsche*, 26 N.E. 51, 54 (Ind. 1890).

[6] *See Washington Mills v. Cox*, 157 F. 634, 639 (4th Cir. 1907); *Soules v. Moore*, 26 A. 629, 629-30 (Vt. 1893).

[7] *See* Francis Wharton, *A Treatise on the Law of Negligence* 73-75 (2d ed. 1878) (citing federal and state cases); *Tullis v. Lake Erie & W. R.R. Co.*, 105 F. 554, 558 (7th Cir. 1901).

[8] *See Louisville & N. R.R. Co. v. East Tennessee, V. & G. Ry. Co.*, 60 F. 993, 996-97 (6th Cir. 1894); *Miner, Read & Garrette v. McNamara*, 72 A. 138, 140 (Conn. 1909).

[9] *See Shellaberger v. Fisher*, 143 F. 937, 940 (8th Cir. 1906); *Hoag v. Lake Shore & M.S.R.R. Co.*, 85 Pa. 293, 298-99 (1877).

"substantial factor" test—which decades later would be adopted in the First Restatement of Torts. *See id.* at 109, 120; *see* Restatement of Torts § 431 (1934); Restatement (Second) of Torts § 431 (1965).

The central concern of judges and scholars who debated the meaning of "proximate cause" was the perceived need to limit a defendant's liability to the potentially infinite universe of third parties who might indirectly be affected by the defendant's wrongful conduct. *See generally* W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* 284-90 (5th ed. 1984) (discussing "the unforeseeable plaintiff" and *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (1928)). Their disagreement reflected, at bottom, different value judgments as to the point at which courts should draw that line. *Id.* at 264 (discussing proximate cause as based on a "social idea of justice or policy").[10] From the time FELA was enacted through today, no consensus has existed among courts or scholars about the proper definition of "proximate cause" in general negligence law. *See id.* at 263 ("There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion."); Nicholas St. John Green, *Proximate and Remote Cause*, 4 Am. L. Rev. 201, 215 (1870) (noting that there was "no settled rule" for proximate cause in tort); *McGill v. Michigan S.S. Co.*, 144 F. 788, 792 (9th Cir. 1906) ("Many definitions of proximate cause

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[10] *See, e.g.*, *Palsgraf*, 248 N.Y. at 352 (Andrews, J., dissenting) ("What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.").

have been formulated, but probably no fixed and definite rule can be applied to all cases.").

Factual Background

Respondent Robert McBride worked as a locomotive engineer for CSX. *See* App. 3a. In 2004, McBride grew interested in making "local" runs, which involves picking up individual rail cars from or delivering them to their final destinations, on either end of their long-distance journey. The process of adding and removing cars during local runs is called "switching," and it requires frequent starts and stops over short distances.

On April 12, 2004, McBride went on a qualifying local run with a supervising engineer. When McBride saw that the train he would be operating was headed by two wide-body locomotives, he grew concerned because wide-body cabs are ill-suited for switching on local runs, and he had never been trained to use one for switching. *See* App. 3a-4a, 57a, 60a. Switching involves frequent stops, and the weight of multiple locomotives in the train requires greater use of the train's hand-operated independent brake. *See* App. 2a-3a.

McBride expressed concern about the wide-body cabs to his supervisor, but he was instructed to "take them as is." *See* App. 4a. By 8:00 p.m. that day, at the end of a 10-hour day, the constant braking needed to switch using the wide-body cab had taken its toll on McBride. *See* JA20a. At the final stop, McBride slammed his hand "into the independent brake, and it felt like—like somebody threw gas on [his] hand and set it afire." App. 4a. McBride screamed in pain and immediately put his hand in his cooler. McBride's injury had lasting effects. He underwent two hand surgeries and required exten-

sive physical therapy. Even after his return to work, he "continued to experience pain, numbness and some limitations in the use of his hand." App. 5a.

District Court Proceedings

McBride brought suit against CSX under FELA. *See* JA1a. Based on the testimony of McBride, his supervisor, and a railroad expert, the jury found that CSX's way of configuring the locomotives for switching was unsafe. *See* App. 55a-56a; JA10a-11a.[11]

The district court charged the jury that, under FELA, "the railroad shall be liable in damages to the injured employee where the injury results, in whole or in part, from the negligence of any of the officers, agents or other employees of the railroad" and that McBride had to prove "1, the defendant was negligent, and 2, defendant's negligence caused or contributed to plaintiff's injuries." App. 64a-65a.

The parties disputed what further instruction the jury should receive on the causation element. *See* App. 62a-64a. McBride proposed—and the court gave—a causation instruction that followed the Seventh Circuit Pattern Instruction:

> Defendant "caused or contributed to" plaintiff's injury if defendant's negligence played a part—no matter how small—in bringing about the injury. The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence.

App. 65a.[12]

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[11] The district court's instructions about that aspect of the jury's verdict are not at issue here.

[12] *See Federal Civil Jury Instructions of the Seventh Circuit*, Instruction No. 9.02 (2009 rev.) (reprinting 2008 revision of Instruction No. 9.02).

The court rejected three instructions that petitioner proposed, all of which made explicit reference to "proximate cause." Petitioner proposed the following instruction on McBride's burden of proving causation:

> In order to establish that an injury was caused by the defendant's negligence, the plaintiff must show that (i) the injury resulted "in whole or in part" from the defendant's negligence, and (ii) the defendant's negligence was a proximate cause of the injury.

App. 73a.

Likewise, petitioner proposed the following instructions regarding contributory negligence and "proximate cause":

> When I use the expression "contributory negligence," I mean negligence on the part of the plaintiff that contributed in whole or in part to and proximately caused the alleged injury.

App. 72a.

> When I use the expression "proximate cause," I mean any cause which, in natural or probable sequence, produced the injury complained of. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury.

App. 71a.

The jury returned a verdict for McBride, but it reduced his damages because it found him 33⅓% at fault for his injuries. *See* App. 45a. The court rejected petitioner's challenges to the jury verdict and entered judgment for McBride. *See* App. 41a-44a.

The Decision Below

On appeal, the Seventh Circuit conducted a thorough review of this Court's cases interpreting FELA § 1 and found no error in the district court's instructions. *See* App. 9a-12a.

The court observed that some of this Court's early cases spoke in the language of "proximate cause" in describing the "nexus between the negligence and the injury." App. 11a-12a. It also noted, however, that other cases recognized a broader causation standard, *see* App. 12a-15a, and that *Rogers* held that "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." App. 18a (internal quotations omitted).

The Seventh Circuit then reviewed post-*Rogers* FELA cases in this Court and the courts of appeals. *See* App. 18a-26a. It found that this Court's precedents reaffirming *Rogers* were "entitled to great weight." App. 35a (internal quotations omitted). It also noted that every court of appeals uniformly agrees "that *Rogers* relaxed the proximate cause requirement." App. 23a (citing cases).[15] The court below recognized that Justice Souter's concurring opinion in *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158 (2007), disagreed with that interpretation of *Rogers*. *See* App. 30a-31a. It reasoned that this Court in *Sorrell* "did not address, much less

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[15] The court rejected petitioner's contention that only five circuits have "stated that a FELA plaintiff need not prove proximate cause." App. 24a-25a nn.5-6, and determined that only three of the seven states petitioner cited actually "adhere[d] to the requirement of proximate cause in FELA cases." App. 34a n.7.

decide th[at] issue" in holding that FELA applies the same causation standard to both railroad negligence and a plaintiff's contributory negligence. App. 36a.

Given the "prior pronouncements" of this Court in *Rogers* and *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), the uniform view of the other circuits, and Congress's longstanding acquiescence to *Rogers* and subsequent cases, the court of appeals reaffirmed that common-law proximate causation is not "required to establish liability under the FELA." App. 34a-40a. The Seventh Circuit therefore held that the district court properly refused petitioner's proposed jury instructions regarding proximate cause and properly instructed the jury by "paraphras[ing] the Supreme Court's own words in *Rogers*." App. 39a.

SUMMARY OF ARGUMENT

I. FELA provides that a rail worker may recover damages for any harm "resulting in whole or in part from" the employer's negligence. 45 U.S.C. § 51. In choosing those words, Congress did not adopt common-law "proximate causation" standards but instead embraced a more flexible approach that permits rail workers to recover upon a showing that their employers' negligence was partly to blame for their injuries. The legislative record confirms the text's plain meaning: it contains no evidence that Congress intended to adopt any of the myriad formulations of common-law proximate cause expressed by courts when FELA was enacted.

In the decades following FELA's passage, this Court repeatedly recognized that the Act avoids the intractable proof problems posed by the more stringent common-law rules and imposes liability for injuries that a defendant's negligence had any part

in bringing about. In *Rogers*, the Court definitively resolved the proper test for legally sufficient causation under FELA: the "resulting in whole or in part" test is met when the employer's negligence "played any part" in producing the injury or death. 352 U.S. at 508. In the 50 years since *Rogers*, this Court consistently has reaffirmed its core holding that common-law notions of proximate cause do not apply in FELA actions.

FELA's more relaxed causation standard furthers Congress's objective to hold railroads fully responsible when their negligent conduct injures or kills their employees. The decision below should be affirmed because the district court correctly instructed the jury that petitioner was liable under FELA for any injuries "resulting in whole or in part" from CSX's negligence.

II. Petitioner's contention that FELA incorporates common-law proximate cause is incorrect because Congress did not use common-law terminology, but instead provided an alternative causation standard tailored to the context of rail-worker injuries. The widespread confusion regarding the meaning of "proximate causation" when Congress enacted FELA further undermines petitioner's argument that, without saying so, Congress incorporated some common-law understanding of that concept.

Petitioner's characterizations of this Court's precedents are equally erroneous. *Rogers* squarely addressed and rejected the notion of proximate cause for which petitioner advocates, and petitioner's efforts to cloud that conclusion are unpersuasive. The pre-*Rogers* cases petitioner cites largely reflect off-hand references to an undefined notion of "proximate

cause," not a well-settled rule that common-law proximate cause applies in FELA cases.

III. For more than half a century, *Rogers* has represented this Court's definitive ruling regarding FELA's causation standard. Countless juries have been instructed accordingly. Notably, petitioner cannot identify a single case where that well-accepted instruction has led to an unreasonable result.

Petitioner invites the Court to endorse "common law" "proximate causation," even as it declines to identify or advocate which among the various standards recognized in common-law cases Congress should be presumed to have adopted. To overturn FELA's well-settled causation standard and replace it with a vague and unspecified notion of "proximate cause" will confuse juries and spawn voluminous federal and state litigation for decades to come. The doctrine of statutory *stare decisis* strongly militates against casting aside a stable, well-functioning legal standard without any sound justification or substitute.

ARGUMENT

I. FELA'S RELAXED CAUSATION STANDARD PERMITS RAILROAD WORKERS TO RECOVER FOR INJURIES OR DEATH "RESULTING IN WHOLE OR IN PART" FROM THE DEFENDANT'S NEGLIGENCE

A. FELA's Plain Language Is Inconsistent With Incorporation Of Common-Law Standards Of "Proximate Causation"

This Court's analysis of FELA starts with the statutory text and, if it is clear, ends there as well. *See, e.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). "The language selected by Congress to fix liability in cases [under FELA] is simple and direct." *Coray v. Southern Pac. Co.*, 335 U.S. 520, 524 (1949). Congress provided in FELA § 1 that a worker or his or her family may recover damages for any injuries or death "resulting in whole or in part from" the defendant's negligence. The ordinary meaning of "resulting from" is "brought about by." *See Webster's Third New International Dictionary* 1937 (2002) (defining "result from" as "arise as a consequence, effect, or conclusion"). As petitioner concedes (at 38), the phrase "in whole or in part," which modifies "resulting," plainly provides that an injury is compensable if it is in *any* part a consequence of the negligence. And the phrase "in part" means "partly," or "in some measure or degree." *Webster's* at 1645 (defining "in part"), 1648 (defining "partly"). Thus, the statute's plain language permits recovery for workplace injuries or death that are brought about *to some degree* by the railroad's negligence.

Other sections of the Act confirm § 1's plain language. Congress reiterated in §§ 2 and 4 the "resulting in whole or in part" standard for liability ex-

pressed in § 1. Congress's repeated use of that key phrase confirms its deliberate word choice, and those words should be given effect. Also, in FELA § 3, Congress provided that the damages for an employee who is contributorily negligent shall be reduced in proportion to his negligence, except "in any case where the violation by [the] common carrier of any statute enacted for the safety of employees *contributed to* the injury or death of such employee." 45 U.S.C. § 53; *see Webster's* at 496 (defining "contribute" as to "have a share in any act or effect"). Because § 3's exception parallels § 1's liability standard for employer negligence, § 3 confirms that the phrase "resulting in whole or in part" simply requires that the defendant's negligence have contributed to some degree to the employee's injuries or death.

Congress's enactment of the phrase "resulting in whole or in part" is inconsistent with the incorporation into § 1 of the various formulations of proximate cause then percolating in the judicial system.[14] First, in enacting § 1, Congress did not use the phrase "proximate cause," even though petitioner contends (at 32) that the term was "well-established" when Congress enacted FELA. Nor did Congress qualify the word "resulting" with any of the myriad linguistic formulations—like "directly," "substantially," "fore-

[14] "Proximate cause" can be used "to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). FELA does not disavow proximate cause in that "generic[]" sense. Those tools, however, must be informed by FELA's text, history, and purposes, all of which indicate that the Act adopted a more straightforward, lenient standard than those prevalent in common-law negligence cases. *See Sorrell*, 549 U.S. at 178-79 (Ginsburg, J., concurring in the judgment).

seeably," "naturally," or "probably"—that courts had widely but inconsistently used in an effort to articulate the amorphous requirements of "proximate" causation. *See supra* pp. 5-9. The absence of any of the hallmark language of common-law proximate causation indicates that Congress did not intend to incorporate into FELA those concepts in the forms then prevailing in general tort cases.

Second, Congress's imposition of liability for injuries attributable "in whole or in part" to a defendant's negligence cannot be squared with prevailing common-law concepts of "proximate causation." As discussed above, the requirement that plaintiffs could recover only for damages that were "direct," "substantial," "foreseeable," or "probable" expressed a policy judgment that defendants should be responsible only for effects in which their negligence played a significant role. In FELA, however, Congress itself spoke to that policy question by providing that railroad workers can recover for injuries or death if the employer's negligent conduct brought about the harm even "in part." It thus relaxed the common law's proximate-causation rule and instead imposed liability for injuries that were brought about to some degree by employer negligence. That standard provided additional protection for railroad workers from their employers' failure to exercise due care. Imposition of common-law proximate-cause requirements would countermand Congress's clearly expressed intent to adopt a more flexible causation standard. *See Neder v. United States*, 527 U.S. 1, 24-25 (1999) (Court will not incorporate common-law rules that are "inconsistent with the statutes Congress enacted").

Third, the phrase "in whole or in part" cannot be limited, as petitioner asserts (at 24), to situations involving "multiplicity of causes" as opposed to "[t]he necessary directness of a cause." The plain meaning of "in part" is "in some measure or degree." *Webster's* at 1645. As petitioner concedes (at 37), a defendant's negligence can be responsible "in part" for injuries if it is one of several direct causes. A defendant's negligence also can be "in part" responsible if it produces the injury or death indirectly. Even causes that are "indirect," "slight," or "improbable" nonetheless may contribute in some "measure or degree" to the result. *See Eglsaer v. Scandrett*, 151 F.2d 562, 566 (7th Cir. 1945) (noting that a "cause which sets in motion the second cause which was the immediate, the direct cause of the accident" is a "partial cause"). Thus, the phrase "in whole or in part" serves two distinct purposes: (1) it makes clear that recovery is permitted even though the defendant's negligence was not the *sole* cause of the injuries or death; and (2) it precludes defendants from escaping liability on the ground that their negligence did not contribute to the injury or death to the degree the more stringent common-law rule would have required.[15]

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[15] Petitioner's citation (at 25 n.5) of cases using "in whole or in part" alongside "proximate" does not show that the phrase had a special meaning limited to multiple causation. Cases often used the phrase without reference to "proximate cause," consistent with the phrase's ordinary meaning of "in some measure or degree." *See, e.g., Forsythe v. Los Angeles Ry. Co.*, 87 P. 24, 26 (Cal. 1906) ("appellant must show that it was not guilty of any negligence which, in whole or in part, caused the injury"); *Mooney v. City of Boston*, 80 N.E. 522, 522 (Mass. 1907) ("the accident was not caused in whole or in part by want of care on the part of the plaintiff").

B. Legislative History Confirms FELA's Plain Meaning

FELA's legislative history provides additional support for that interpretation of the statute's text. The legislative record reveals no evidence that Congress actually meant to incorporate the more restrictive "proximate cause" limitations judges had imposed in run-of-the-mill negligence cases. Moreover, the legislative record contains no indication that Congress adopted, in substance, any particular understanding of "proximate cause" among the multiple, conflicting conceptions being fiercely contested at the time. Like the statute's text, the legislative history evinces no affirmative indication of congressional intent to adopt a common-law conception of "proximate cause."

Instead, Congress's core purpose in FELA was "to *change* the common-law liability of employers . . . for personal injuries received by employees," thereby increasing railroad safety and providing just compensation for workers injured or killed on the job, as well as their families. H.R. Rep. No. 60-1386, at 1 (emphasis added). Consistent with § 1's "in whole or in part" language, Congress intended that "[t]he master should be made *wholly responsible* for injury to the servant by reason of the negligence of a coservant." *Id.* at 2 (emphasis added). Similarly, Congress intended "that a *strict rule of liability* of the employer to the employee for injuries received by defective machinery [would] greatly lessen personal injuries on that account." *Id.* (emphasis added). By making the employer fully responsible for its negligence, Congress sought to induce the employer "to exercise the highest degree of care . . . for the safety of [all employees] in the performance of their duties." *Id.*

Congress confirmed its rejection of the various common-law formulations of proximate cause when, in 1939, it added § 4 to FELA, abolishing entirely the "assumption of risk" defense. The 75th Congress considered two versions of the 1939 amendments. The House version would have provided that the "assumption of risk" defense did not apply "where the negligence of such common carrier, its officers, agents, or employees, *proximately contributed* to the injury or death" of the employee. 42 Cong. Rec. 10,709-10 (1939) (emphasis added); *see also* H.R. Rep. No. 75-2153, at 1 (1938). However, the phrase "proximately contributed" was stripped from the final legislation. *See* 53 Stat. 1404. Instead, Congress adopted the Senate's language, which paralleled FELA § 1, thus eliminating the assumption-of-risk defense where the injury or death "resulted in whole or in part" from the negligence of any of defendant's agents. *Id.* (codified at 45 U.S.C. § 54). Section 4 unquestionably eliminated the assumption-of-risk defense in cases where the defendant is liable for negligence of its agents under § 1. *See Tiller v. Atlantic Coast Line R.R. Co.*, 323 U.S. 574, 580 (1945). Given the parallel "in whole or in part" language that Congress mirrored in § 4, and its explicit rejection of "proximate cause" language in that amendment, it would be implausible for this Court to conclude that Congress intended the same linguistic formulation in § 1 to have incorporated a proximate-cause standard about which courts have never agreed.

C. This Court's Precedents Confirm That FELA Departed From Common-Law Proximate-Cause Standards

Consistent with FELA's text and legislative history, numerous decisions of this Court over the past

century have "long settled" that Congress did not intend to incorporate any of the various common-law proximate-cause standards into FELA. *Sorrell*, 549 U.S. at 177 (Ginsburg, J., concurring in the judgment). Decisions early in the twentieth century expressly recognized that FELA's "resulting in whole or in part" language constituted a departure from the proximate-cause standards applied by courts in common-law negligence cases. Those cases culminated in *Rogers*, which definitively recognized that a more straightforward and relaxed causation standard applies in FELA cases. Since *Rogers*, this Court has reaffirmed that holding numerous times.

1. Pre-*Rogers* precedents recognized FELA's departure from common-law proximate-causation standards

In the first four decades after FELA's enactment, this Court repeatedly recognized that the "resulting in whole or in part" language of § 1 effectuated a relaxation of proximate-causation standards applicable in common-law negligence cases. Although petitioner touts 20 cases of this Court that mention "proximate causation," those references were in *dicta* and/or contained little or no elaboration of the content of that term. *See infra* pp. 47-49. In contrast, the cases that actually examined FELA's causation standard steadfastly rejected the applicability of the stricter common-law "proximate cause" formulations.

In *Spokane & Inland Empire Railroad Co. v. Campbell*, 241 U.S. 497 (1916), this Court affirmed a jury verdict for the plaintiff and emphasized that § 1 "imposes a liability for injury to an employee 'resulting *in whole or in part* from'" the defendant's negligence. *Id.* at 509. It also stressed § 3's elimination of contributory negligence in any case where the defen-

dant's violation of the Safety Appliance Act ("SAA") "*contributed to*" the employee's injury or death. *See id.* at 510. Although the Court found it "unnecessary to say the effect of the statute is *wholly* to eliminate the question of proximate cause," it "agree[d]" that FELA, by the foregoing terms, "eliminated" "the element of proximate cause" at the very least "where concurring acts of the employer and employee contribute to the injury or death of the employee." *Id.* (emphasis added). Thus, this Court early on recognized that FELA abandoned the common-law "sole proximate cause" rule.

Two years later, Justice Holmes's unanimous opinion in *Union Pacific Railroad Co. v. Hadley*, 246 U.S. 330 (1918), swept away the common-law proximate-causation rule that limits liability to the last culpable actor in a causal chain. That rule—often known by the maxim that the common law does not "go beyond the first step" in assessing liability—was recognized by many courts and, in fact, had been enunciated by this Court per Justice Holmes in a non-FELA case earlier that same year. *See Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-34 (1918); *see also supra* p. 7 n.8. In *Hadley*, however, the Court squarely rejected that common-law rule under FELA. The railroad had appealed a jury verdict on the ground that the plaintiff, who was killed in a train crash, was himself negligent in failing to warn the oncoming train, and that his own negligence was therefore the proximate cause of his own death. 246 U.S. at 333. Affirming the judgment below, the Court said that, "even if Cradit's negligence should be deemed the logical last [*i.e.*, the proximate cause under the last-actor approach], it would be emptying the statute of its meaning to say

that his death did not 'result in part from the negligence of any of the employés' of the road." *Id.*

As the Seventh Circuit later noted in *Eglsaer v. Scandrett*, FELA had "enlarged" the common-law concept of proximate cause:

> Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has "causal relation,"—if the injury or death resulted "*in part*" from defendants' negligence, there is liability.
>
> The words "in part" have enlarged the field or scope of proximate causes—in these railroad injury cases.

151 F.2d at 565-66.

The same Term as *Hadley*, this Court in *Union Pacific Railroad Co. v. Huxoll*, 245 U.S. 535 (1918), unanimously approved a jury instruction that the defendant was liable under FELA if a defective power brake "contributed 'in whole or in part' to cause the death of deceased." *Id.* at 538; *see id.* at 537 (quoting jury instruction to the same effect). Moreover, in holding that the jury's verdict for the plaintiff should be affirmed, the Court held that the evidence was sufficient to show that the defective brake "contributed in part, at least, to the fatal result." *Id.* at 540. Consistent with *Hadley*, the Court nowhere indicated that FELA required the plaintiff's death to be the "direct," "foreseeable," "natural," or "probable" consequence of the defect.[16]

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[16] Numerous other FELA cases do not mention "proximate" causation. *See, e.g., Moore v. Chesapeake & O. Ry. Co.*, 340 U.S.

In *Conzy v. Southern Pacific Co.*, this Court again rejected incorporation of common-law proximate-cause requirements into FELA. The Court held that, under FELA, a plaintiff is entitled to recovery "if [the defendant's] defective equipment was the *sole or a contributory proximate cause*" of the death or injury. 335 U.S. at 523 (emphasis added); *see also Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 435 (1949) (referring to "contributory proximate cause"). In applying that test, the *Conzy* Court expressly rejected the common-law distinctions between "causes" and mere "conditions," and "substantial" and "insignificant" causes. 335 U.S. at 523; *see Conzy v. Southern Pac. Co.*, 185 P.2d 963, 968 (Utah 1947), *rev'd*, 335 U.S. 520 (1949); *see also supra* pp. 6-8 (explaining these distinctions in common-law proximate-cause doctrines). The Court stressed that consideration of these "dialectical subtleties," which pervaded common-law proximate-cause analyses, could "serve no useful interpretative purpose" under FELA. 335 U.S. at 524. Rather, the Court held that "Congress . . . for its own reasons imposed *extraordinary safety obligations* upon railroads and . . . commanded that if a breach of these obligations *contributes in part* to an employee's death, the railroad must pay damages." *Id.* (emphases added; citing

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573, 575 (1951) (an employee must "prove negligence of [the employer] which caused the . . . accident"); *Atchison, T. & S. F. Ry. Co. v. Toops*, 281 U.S. 351, 354 (1930) ("The negligence complained of must be the cause of the injury."); *Chicago, M. & St. Paul Ry. Co. v. Coogan*, 271 U.S. 472, 476 (1926) (employer is liable if employer's negligence "caused or contributed to cause" the injury); *Baltimore & O. R.R. Co. v. Groeger*, 266 U.S. 521, 528 (1925) (employer "is liable for any negligence chargeable to it which caused or contributed to cause decedent's death").

FELA §§ 1 and 3). Recognizing that railroad accidents often involved multiple contributing events that are "inseparably related to one another in time and space," the Court held that the jury properly could have imposed liability if it "found that decedent's death resulted from any or all of the foregoing circumstances." *Id.*

2. *Rogers* definitively recognized FELA's relaxed causation standard

By the time *Rogers* reached this Court, prior decisions already had rejected most of the various common-law formulations of "proximate cause": the "sole proximate cause" test (*Campbell*), the "last culpable actor" test (*Hadley*), and the distinctions between "causes" and "conditions" and "substantial" and not "substantial" causes (*Coray*). Nonetheless, lower federal and state courts continued to invoke common-law strictures to deny workers a jury trial, contrary to FELA's text and purposes. *See Rogers*, 352 U.S. at 509-10 ("In a relatively large percentage of the cases reviewed, the Court has found that lower courts have not given proper scope to this integral part of the congressional scheme."); *see id.* at 543-44 & Appendices A & B (Frankfurter, J., dissenting) (cataloguing dispositions of pre-*Rogers* cases).

Against that backdrop, this Court in *Rogers* definitively resolved the proper test for legally sufficient causation under FELA: the "resulting in whole or in part" standard of § 1 is satisfied if the employer's negligence "played any part" in producing the injury or death. *Id.* at 508.[11] As every federal court of

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[11] *Rogers* did not "overrul[e]" this Court's prior decisions on FELA causation. Pet. Br. 34-35, because it was consistent with them.

appeals subsequently has recognized. *Rogers* made clear that FELA did not adopt the more restrictive common-law conceptions of proximate causation.[18]

The Court granted certiorari in *Rogers* to review a Missouri Supreme Court decision overturning a jury verdict for the employee on the ground of insufficient evidence that his injuries resulted from the railroad's negligence. Rogers, a laborer, was walking alongside the railroad tracks using a hand-held torch to burn weeds and other vegetation from the adjoining land. When he heard the whistle of an oncoming train, he receded as instructed to a position off the tracks near a culvert and watched the oncoming train for "hot-boxes" (smoke, sparks, or fire near the wheels). While standing at the designated spot, he became enveloped in smoke and flames because "[t]he passing train had fanned the flames of the burning vegetation and weeds, carrying the fire to the vegetation around his position." *Id.* at 502. As he retreated from the engulfing flames, he slipped on loose gravel and fell from the culvert, suffering serious injuries. Rogers alleged that the defendant was negligent in numerous respects, including requiring employees to stand so close to burning vegetation in the vicinity of oncoming trains and failing to maintain the gravel in the area around the culvert. *See id.* at 502-03. The railroad, in turn, alleged that Rogers himself had

[18] *See* Br. in Opp. 16-24 (cataloguing cases); *see also Ammar v. American Export Lines, Inc.*, 326 F.2d 955, 959 (2d Cir. 1964) (*Rogers* eliminated "the question of remoteness of damages"); *Consolo v. T.I. James & Co.*, 702 F.2d 1023, 1024 (5th Cir. 1983) (per curiam) (FELA encompasses "any cause regardless of immediacy"). Contrary to petitioner's contention (at 46), the First Circuit "recognize[s] the considerably relaxed standard of proof in FELA cases." *Moody v. Maine Cent. R.R. Co.*, 823 F.2d 693, 695 (1st Cir. 1987); *see* App. 24a.

negligently caused the spread of the fire by failing to attend to it. *See id.* at 503-04.

This Court reversed the lower court's directed verdict for the defendant, finding that "the evidence was sufficient to support the jury finding" of causation. *Id.* at 503. The Court's reasoning elucidates the "simple and direct" causation standard applicable under FELA § 1. *Consol.*, 335 U.S. at 524. The Court first concluded that there was sufficient evidence the defendant negligently put Rogers in an unsafe work environment, citing "testimony that the burning off of weeds and vegetation was ordinarily done with flame throwers from cars on the tracks" rather than by "a workman on foot using a crude hand torch," as well as "uncontradicted testimony" that Rogers assumed his position near the tracks "in furtherance of explicit orders to watch for hotboxes." *Rogers*, 352 U.S. at 503. The Court then held there was sufficient evidence of causation under FELA because a jury could find, based on "[c]ommon experience," that the defendant's negligence in ordering Rogers to stand in the vicinity of an open fire and a passing train "played a part in [Rogers'] injury." *Id.* Having reached that conclusion, the Court held, "it was an *irrelevant consideration* whether the *immediate* reason for his slipping off the culvert was the presence of gravel negligently allowed by respondent to remain on the surface, or was some cause not identified from the evidence." *Id.* (emphases added). The Court thus expressly disavowed any need under § 1 to test whether the defendant's negligence or "some [other] cause" was the "immediate" cause of the resulting injuries, as would have been required in many jurisdictions in ordinary negligence cases. Consistent with § 1's plain language, the Court held

the proper standard to be whether the defendant's negligence "played a part in the petitioner's injury." *Id.*

Rogers reiterated that holding numerous times in rejecting the Missouri Supreme Court's contrary reasoning, which rested on that court's view that Rogers' own inattention to the fire, not the defendant's negligence, was the legal cause of his injuries. *Id.* at 503-04. The lower court reasoned that the "immediate cause" of Rogers' fall was "that loose gravel on the surface of the culvert rolled out from under him," but it held that his injuries were "something extraordinary, unrelated to, and disconnected from" any defects in the gravel because it was Rogers' "inattention to the fire" that caused him to "move blindly away and fall." *Id.* at 504 (internal quotations omitted).

This Court rejected that reasoning on two grounds, both of which relied on FELA's relaxed standard of causation. First, the Court held that the evidence did not conclusively prove Rogers' own conduct was the "sole cause" of the accident. *Id.* Rather, the Court held that the "decision was exclusively for the jury to make" because the evidence was sufficient for the jury reasonably to conclude that Rogers' "injury resulted *at least in part* from the respondent's negligence." *Id.* at 504-05 (emphasis added).

Rogers also rejected the lower court's conclusion that Rogers' case could not go to a jury because his conduct "was at least as probable a cause for his mishap as any negligence of the respondent." *Id.* at 505. This Court held that the court below had improperly adopted "language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was

the sole, efficient, producing cause of injury." *Id.* at 506. Because "[t]he statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence," the Court held, it "does not matter" that "other causes, including the employee's contributory negligence," may have played a role (even a greater role) in bringing about the injuries. *Id.* at 506-07.

Rogers repeatedly concluded that the "single inquiry" under § 1 is whether "negligence of the employer played any part at all in the injury or death." *Id.* at 507; *see also id.* at 508 (the "single question" is "whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit"). FELA does not require a further showing that the defendant's negligence played a "substantial" or "direct" role. As *Rogers* explained, Congress enacted a more flexible rule because it was "dissatisfied with the common-law duty of the master to his servant." *Id.* at 507. FELA "supplants that duty with the far more drastic duty of paying damages for injury or death at work *due in whole or in part to the employer's negligence*." *Id.* (emphasis added). Consistent with § 1's plain language and this Court's prior interpretations of that provision, *Rogers* held that workers can recover under FELA if the defendant's negligence contributes to any degree to the plaintiff's injuries or death.

Rogers' holding was not limited to the issue of contributory negligence or "multiple causes." The Court's statement that it was "irrelevant" under the "resulting in whole or in part" standard whether the negligently maintained gravel or some other factor was the "immediate" cause of Rogers' injuries, *id.* at 503, plainly relaxed the common-law standard regard-

ing the directness of the cause. By disavowing any need to determine the "immediate" cause of Rogers' injuries, the Court held that FELA's "resulting in whole or in part" causation standard relaxed the stricter requirement under some common-law cases that the defendant's negligence be the "immediate" or "direct" cause of the plaintiff's injuries. *See supra* pp. 6-7.

Moreover, in many situations like *Rogers* itself, the distinction between "multiple" causes and "indirect" causes falls apart. The *Rogers* Court characterized the causation issue in terms of both exclusiveness (whether Rogers or the railroad was the "sole" cause of the injury) and directness (whether the unsafe working conditions were the "immediate" cause of Rogers' injury compared to other factors like his own conduct). And it rejected as contrary to FELA's terms *both* the lower court's contention that the defendant's negligence had to be the "sole, efficient, producing cause of injury," 352 U.S. at 506, *and* its belief that the defendant's negligence had to be the "immediate" cause, *id.* at 504. Thus, although *Rogers*' relaxation of FELA's causation standard certainly encompasses multiple causation, including comparative fault, it cannot plausibly be read as limited to overriding only the multiple-cause aspects of common-law proximate cause. *See also Webb v. Illinois Cent. R.R. Co.*, 352 U.S. 512, 515-16 (1957) (applying *Rogers* to facts raising no issue of multiple concurrent causes).[18]

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[18] Petitioner incorrectly asserts (at 39) that the *Rogers* standard equates to "but for" cause. The more relaxed *Rogers* standard allows courts and juries to find in extreme cases that the causal nexus between the defendant's negligence and the injury is so attenuated that it does not reflect "[c]ommon experience."

3. This Court's post-*Rogers* precedents repeatedly have reaffirmed *Rogers*' causation standard

In the half-century since *Rogers*, this Court consistently has reaffirmed its holding that a plaintiff need not demonstrate common-law proximate causation under FELA to recover for the defendant's negligence. By contrast, not a single decision of this Court has cast any doubt on the correctness of *Rogers*' settled holding.

Rogers had a significant impact from the moment it was decided. That same day, in *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1957), this Court adopted the *Rogers* standard as the "standard of liability under the Jones Act," *id.* at 523 (plurality op.), which incorporated FELA by reference, *see* 46 U.S.C. § 30104. The following year, in *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958), this Court likewise cited *Rogers* and held that a defendant is liable under FELA and the Jones Act "if [a] defect or insufficiency in equipment *contributes in fact* to the death or injury in suit." *Id.* at 433 (emphasis added); *see id.* at 439 (Jones Act incorporates

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Rogers, 352 U.S. at 503, to conclude that the negligence played any part in producing the injury. *See Inman v. Baltimore & O. R.R. Co.*, 361 U.S. 138, 138, 140 (1959) (holding, under "the *Rogers* yardstick," that defendant's negligence "could have played no part in petitioner's injury," which was suffered "when an intoxicated automobile driver ran into him one midnight when he was on duty flagging traffic for a passing train"); *Nicholson v. Erie R.R. Co.*, 253 F.2d 938, 940, 941 (2d Cir. 1958) (although under the "modest requirements" of *Rogers* defendant's negligence "need not be the proximate cause of the injury," "[i]t is not enough . . . that the injury would not have happened but for the negligence," affirming dismissal because the "cause and effect here were too far removed from one another in space and time").

"the entire judicially developed doctrine of liability" under FELA). Since *Ferguson* and *Kernan*, the *Rogers* standard repeatedly has been applied by lower courts as the causation standard under the Jones Act. *See, e.g., Alholm v. American S.S. Co.*, 144 F.3d 1172, 1178 (8th Cir. 1998); *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997) (en banc); *Miller v. Farrell Lines, Inc.*, 247 F.2d 503, 506 (2d Cir. 1957).[8]

Subsequent cases from this Court have reaffirmed and applied *Rogers*. In *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108 (1963), eight Justices reiterated that the question for the jury under FELA is whether "employer negligence . . . played *any* role in producing the harm." *Id.* at 116. The employee in that case had suffered serious injury after being bitten by a large, disease-carrying insect while working near a stagnant pool of water "in and about which were dead and decayed rats and pigeons, or portions thereof." *Id.* at 109. Siding with the railroad, the court of appeals had held that the "'chain of causation [was] too tenuous * * * to support a conclusion of liability.'" *Id.* at 112 (quoting 173 N.E.2d 382, 388 (Ohio Ct. App. 1961)) (ellipsis in original). This Court reversed, and in so doing both rejected the appeals court's adherence to common-law proximate-

[8] The United States also has affirmed repeatedly FELA's relaxed causation standard in Jones Act cases. *See* Appellee Br. 16, *Calhoun v. United States*, 42 F. App'x 989 (9th Cir. 2002) (No. 00-35478) ("the shipowner-employer may be found liable if its negligence played even the slightest part in causing plaintiff's injuries"); Appellee Br. 9, *Dunn v. United States*, 211 F.3d 125 (5th Cir. 2000) (No. 98-31372) ("[A Jones Act plaintiff] may recover if defendant's negligence played even the slightest part in causing the injury."); Appellee Br. 11, *Loyer v. United States*, 77 F.3d 477 (5th Cir. 1995) (No. 95-30210) (same).

cause standards and quoted at length from *Rogers*. *See id.* at 117; *id.* at 126 (Stewart, J., dissenting) (agreeing with the majority on the application of *Rogers* but dissenting on other grounds); *see also Dennis v. Denver & Rio Grande W. R.R. Co.*, 375 U.S. 208, 210 (1963) (per curiam) (reversing lower court's entry of judgment notwithstanding the verdict for defendant based on *Rogers*).

In *Crane v. Cedar Rapids & Iowa City Railway Co.*, 395 U.S. 164 (1969), the Court again stated unambiguously that an injured railroad employee "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's" negligence. *Id.* at 166. The Court expressly contrasted the relaxed causation standard under FELA with the more rigorous common-law standards applicable to a state-law negligence action brought by a non-employee. *See id.*

Similarly, in *Consolidated Rail Corp. v. Gottshall*, this Court noted that it had "liberally construed FELA to further Congress' remedial goal" and, as part of that construction, reaffirmed *Rogers*' holding "that a relaxed standard of causation applies under FELA." 512 U.S. at 543. Quoting *Rogers*, the Court reiterated that, under FELA, "'the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" *Id.* (quoting 352 U.S. at 506); *accord Atchison, T. & S. F. Ry. Co. v. Buell*, 480 U.S. 557, 561-62 & n.8 (1987).[21]

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[21] Petitioner (at 43-44) dismisses the statements in *Crane* and *Gottshall* as mere "dictum," but those decisions are "entitled to great weight" because they are links in an unbroken chain of cases reaffirming *Rogers*' holding. *See Rita* (internal

And in *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003), this Court reaffirmed *Rogers*' holding that it was "irrelevant" "whether the immediate reason' for an employee's injury was the proven negligence of the defendant railroad or 'some cause not identified from the evidence.'" *Id.* at 161-62 (quoting *Rogers*, 352 U.S. at 503); *see also id.* (noting *Rogers*' holding that "'[t]he inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit'") (quoting *Rogers*, 352 U.S. at 508).

In sum, in numerous cases spanning nearly a century, this Court has recognized that FELA's standard for legally sufficient causation is what the statute says: a defendant is liable to its workers for injuries or death that "result[] in whole or in part" from the defendant's negligence.

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quotations omitted); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (*stare decisis* commands adherence "not only to the holdings of our prior cases, but also to their explications of the governing rules of law"). Petitioner also contends (at 43-44) that these statements relate only to multiple causation. But § 1's "resulting in whole or in part" language and *Rogers*' "played any part" holding foreclose limitations based on the supposed lack of "directness" between the negligence and the injury. Finally, petitioner says (at 44) that *Gottshall* is "especially dubious authority" because it reiterated the importance of common-law principles in interpreting FELA. But there is no inconsistency between *Rogers*' and *Gottshall*'s methodology for interpreting FELA. *See infra* pp. 39-40. *Gottshall*'s reaffirmance of *Rogers* confirms that *Rogers*' holding is "long settled." *Sorrell*, 549 U.S. at 177 (Ginsburg, J., concurring in the judgment), and should continue to be followed under the principle of statutory *stare decisis*. *See infra* pp. 51-53.

D. FELA's Relaxed Causation Standard Effectuates Congress's Remedial Purposes

The causation standard embodied in FELA § 1 is integral to the statute's core purposes. As this Court consistently has recognized, FELA's provisions should be construed liberally "to further Congress' remedial goal." *Gottshall*, 512 U.S. at 543; *see also, e.g.*, *Jamison*, 281 U.S. at 640 ("The Act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted[.]"). The crux of that remedial goal was "to extend further protection to employees" by "extend[ing] and enlarg[ing] the remedy provided by law to employees engaged in interstate commerce in cases of death or injury to such employees while engaged in such service." H.R. Rep. No. 61-513, at 3 (1910). Congress intended "to shift the burden of the loss resulting from these casualties from 'those least able to bear it,' and place it upon those who can . . . 'measurably control their causes.'" S. Rep. No. 61-432, at 2 (1910); *see also Gottshall*, 512 U.S. at 542 ("Cognizant of the physical dangers of railroading that resulted in the death or maiming of thousands of workers every year, Congress crafted a federal remedy that shifted part of the 'human overhead' of doing business from employees to their employers").[22]

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[22] FELA has been extremely effective. *See Railroad Safety Programs: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the H. Comm. on Energy and Commerce*, 102d Cong. 244 (1991) (Arnold B. McKinnon, Chairman, President, and CEO of Norfolk Southern Corp., testifying that FELA was "one of the things that drove us to our current safety programs," which were "success[ful] . . . in reducing accidents, reducing injuries, and consequently reducing potential for FELA claims").

As this Court has recognized, "dialectical subtleties" such as those that persistently confounded the common-law doctrine of proximate cause (both in 1908 and today) conflict with those core congressional objectives. *Coray*, 335 U.S. at 524. To ensure that railroad workers receive appropriate compensation for injuries attributed to their employers' negligence, this Court has "rejected many of the refined distinctions necessary in common-law tort doctrine for the purpose of allocating risks between persons who are more nearly on an equal footing as to financial capacity and ability to avoid the hazards involved." *Kernan*, 355 U.S. at 438; *see Urie v. Thompson*, 337 U.S. 163, 186 (1949).

Imposing common-law concepts of "proximate causation" also is inappropriate because Congress achieved the main purposes of the common-law "proximate cause" doctrine through other statutory means. Unlike the common law of negligence, FELA already restricts the statutory cause of action to rail workers or their families. *See Kelley v. Southern Pac. Co.*, 419 U.S. 318, 324-25 (1974). There is thus no danger that, without common-law proximate-cause limitations, railroads will be exposed to suit by an open-ended class of unknown plaintiffs, or that they will be held liable for "remote consequences" that "go forward to eternity." Pet. Br. 21-22 (internal quotations omitted). Petitioner's hypotheticals (at 23) involving implausible claims by strangers far removed from the defendant are irrelevant given that FELA does not permit such remote plaintiffs to sue. Moreover, a jury properly instructed under *Rogers* certainly could use its common sense and experience to decide that the injuries in those hypotheticals did not

result, even in part, from the defendant's negligence. *See supra* p. 31 n.19.

Re-injecting common-law proximate-causation standards into FELA thus would undermine Congress's core objectives and undo nearly 100 years of effort by this Court to effectuate them. This Court's historical role in FELA cases since the statute's enactment has been a bulwark against decisions by state and lower federal courts that invoked "the refined distinctions" of common-law tort doctrine to limit the statute's scope and to restrict a worker's right to have the case heard by a jury. *Kernan*, 355 U.S. at 438; *Rogers*, 352 U.S. at 509-10. The "simple and direct" causation standard long recognized by this Court, *Coray*, 335 U.S. at 524, is critical to the continued achievement of Congress's fundamental goal of ensuring that employers are "wholly responsible" to their employees for the consequences of their negligence. H.R. Rep. No. 60-1386, at 2.

E. The Jury Instructions Below Correctly Articulated FELA's Causation Standard

The district court's jury charge precisely tracked FELA's language and this Court's decisions interpreting it. The court used the Seventh Circuit pattern FELA jury instruction on causation, which states that "Defendant 'caused or contributed to' Plaintiff's injury if Defendant's negligence played a part—no matter how small—in bringing about the injury." JA31a; *see Rogers*, 352 U.S. at 508 (jury question is "whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit"). That pattern instruction, uniformly followed by federal courts of appeals, *see infra* p. 51 n.31, was correct, and the decision below should therefore be affirmed.

II. PETITIONER'S ARGUMENTS FOR OVERTURNING THE WELL-ESTABLISHED FELA CAUSATION STANDARD ARE UNPERSUASIVE

A. FELA Does Not Incorporate Any Of The Various Traditional Common-Law Conceptions Of Proximate Cause

1. Petitioner argues (at 18) that common-law proximate causation should be imported into the statute "under the established methodology for interpreting FELA." Petitioner's analysis mischaracterizes and misapplies this Court's well-settled methodology for statutory construction.

As this Court held in *Carter v. United States*, 530 U.S. 255 (2000), "[t]he canon on imputing common-law meaning applies only when Congress makes use of a statutory *term* with established meaning at common law." *Id.* at 264. Congress's codification of an established common-law term is a critical predicate for inferring intent to incorporate the whole body of judicial decisions associated with that term. Here, that predicate is missing: petitioner admits (at 23) that FELA's text does not contain the words "proximate causation" (or any variant of that term), and it denies (*id.*) that FELA contains any other language referring to any notion of proximate cause (as that term was variously understood at common law).

In the cases on which petitioner relies (at 19-21), the Court rooted its incorporation of common-law rules in FELA's codification of the terms "negligence," "injury," and "damages." *See Michigan Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 70-74 (1913) (considering whether the term "damages" is limited to pecuniary losses); *Urie*, 337 U.S. at 180 ("whether

silicosis is an 'injury' within the meaning of that term as used in [FELA]"); *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 336, 337-38 (1988) (whether "damages" includes prejudgment interest); *Gottshall*, 512 U.S. at 542 ("[o]ur task today is determining under what circumstances emotional distress may constitute 'injury' resulting from 'negligence'") (quoting 45 U.S.C. § 51); *Ayers*, 538 U.S. at 145-59 (whether the term "injury" allows recovery for fear of cancer). The absence of any affirmative textual indication of congressional intent to invoke common-law causation concepts undermines the argument for incorporation.

Moreover, this Court has held it inappropriate to adopt the common-law wholesale when doing so would be inconsistent with statutory language. Thus, in *Neder v. United States*, the Court explained that, because the mail-fraud statute, 18 U.S.C. § 1341, "prohibit[s] the 'scheme to defraud,' rather than the completed fraud," the "common-law requirements of 'justifiable reliance' and 'damages'" are "incompatible" with the statute's "language" and thus "plainly have no place" in a prosecution under that provision. 527 U.S. at 24-25; *see Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 648-49 (2008) (relying on *Neder* to hold that mail fraud does not include common-law reliance requirement); *id.* at 650-53 (rejecting incorporation of common-law reliance requirement into civil RICO action).

In this case, the principles set forth in *Neder* and *Bridge* foreclose incorporation of any of the various limitations imposed by the competing common-law proximate-cause standards existing when Congress enacted FELA. *See supra* pp. 6-8. Because Congress expressly declined to adopt those common-law stan-

dards in FELA's text, they "have no place" in a FELA action. *Neder*, 527 U.S. at 23. Petitioner cites no decision of this Court incorporating common-law rules that contradict a statute's plain language.

Sorrell was not a departure from this Court's well-settled interpretive methodology. Consistent with *Carter*, *Neder*, and *Bridge*, this Court looked to the common law to determine whether the causation standard for "contributory negligence" in FELA § 3 was the same as applies to employer negligence under the statute. *See* 549 U.S. at 166. Because FELA § 3 incorporated the common-law term "contributory negligence" and the statutory text was otherwise "silent" as to the causation standard, the Court concluded that, consistent with the common-law approach, "the same standard of causation applies" under FELA § 3 as under FELA § 1. *Id.* at 171. The Court specifically declined to determine the *content* of that causation standard, however, because the issue was not properly presented. On that question, FELA is not "silent"; its language forecloses incorporation of common-law proximate-causation standards. Accordingly, "the canon on imputing common-law meaning has no bearing." *Carter*, 530 U.S. at 264, 267.

2. The fact that there was no consensus on the meaning of proximate cause at common law when Congress enacted FELA further undermines petitioner's interpretive theory. The pervasive disagreement and uncertainty over "proximate causation" requirements plagued judicial efforts to give coherent meaning to "proximate cause" and rendered the term "absolutely worthless" as a practical guide to courts and juries. *Ehrgott*, 96 N.Y. at 280. Such uncertainty negates any reliable inference courts can

make about what legal concepts Congress incorporated. *See Bruesewitz v. Wyeth LLC*, No. 09-152, slip op. 18-19 (U.S. Feb. 22, 2011) (Congress cannot be said to incorporate courts' usage unless "all (or nearly all) of the relevant judicial decisions have given a term or concept a consistent judicial gloss") (internal quotations omitted); *Moskal v. United States*, 498 U.S. 103, 113-17 (1990) (rejecting reliance on "'common law meaning' principle" where party "failed to demonstrate that there was, in fact, an 'established' meaning" of the concept in question "at common law").

Indeed, it is implausible that Congress *sub silentio* incorporated into FELA such a heavily contested concept that *limits* a defendant's liability given the clear statutory purpose to *broaden* railroads' liability for negligence to workers. And for Congress to have done so without providing one word's worth of guidance about the content of that standard or how it should be applied is especially unpersuasive. Indeed, the best petitioner can offer is that, "whatever its precise formulation, proximate causation under FELA has the same basic meaning that it had at common law." Br. 19 n.3. But, given that proximate causation's "basic meaning" had not been determined, petitioner's theory is no guidance at all.

B. Petitioner's Efforts To Distinguish *Rogers* Are Unavailing

Petitioner asserts (at 39) that *Rogers* only relaxed the common-law proximate-cause standard in the context of "multiple causes" and "assumed that FELA requires" common-law proximate causation for the "directness" of the cause. Petitioner argues that this Court and every federal court of appeals misread

Rogers in this regard. None of petitioner's arguments is persuasive.

First, as explained above, *see supra* pp. 28-29, petitioner's reading of *Rogers* is contrary to the Court's holding that the "immediate" cause of the accident was "irrelevant" once it was determined that the defendant's negligence "played any part" in causing the accident. Petitioner completely ignores that aspect of the Court's opinion. The respondent in *Sorrell* also did not call the Court's attention to this critical aspect of *Rogers*, and it was not addressed in Justice Souter's concurrence.

Second, petitioner posits (at 39-40) that *Rogers* implicitly approved the trial court's instruction that the jury should find for the railroad if the employee's "negligence, if any, was the sole proximate cause of his injuries" and if those injuries "were not directly contributed to or caused by any negligence of the defendant." 352 U.S. at 505 n.9 (quoting jury instruction). But *Rogers* signaled no approval of that quoted instruction.[25] The Court referred to the instruction given only to reject the Missouri Supreme Court's conclusion "that the [employee]'s conduct was the sole cause of his mishap." *Id.* at 504. The Court merely pointed out that the jury had been "instructed to return a verdict for the [railroad] if it was found that negligence of the [employee] was the sole cause of his mishap." *Id.* at 504-05. Because the jury returned a verdict for the employee, and because the Court assumes "the verdict was obedient to the trial judge's charge," "the jury [necessarily] found that" the employee's "injury resulted at least in part from

[25] Indeed, *Rogers* faulted the trial court for failing to instruct "that contributory negligence, if any, was to be considered merely in diminution of any damages." 352 U.S. at 505 n.9.

the [railroad]'s negligence," contrary to the Missouri Supreme Court's conclusion. *Id.* at 305.

Third, petitioner asserts (at 40) that the employee in *Rogers* "did not ask this Court to abandon proximate causation." In fact, Rogers' briefs repeatedly advocated a "*broadened* concept of 'proximate cause' under [FELA]." Pet. Br. 24, *Rogers*, *supra* (filed Aug. 22, 1956) (emphasis added); *see id.* at 25 (advocating that FELA abandoned the directness requirement under the "old concept of proximate cause"); *id.* at 12 ("under [FELA], the concept of proximate cause is *broadened*") (emphasis added). And he criticized the Missouri Supreme Court for "fail[ing] to recognize the broadened concept of 'proximate cause' under [FELA]" in overturning the jury's verdict. *Id.* at 27.

Although Rogers also argued that the railroad's negligence was the proximate cause of his injury, his argument was that FELA's broader causation standard had been satisfied—not that his claim should be tested under any of the various common-law proximate-cause formulations then being debated, which would have *limited* his opportunity for recovery. *See id.* at 24 (point heading asserting that "Respondent's Negligence Was the Proximate Cause of Petitioner's Injury *Under the Federal Employers' Liability Act*") (emphasis added). Moreover, the railroad in *Rogers* cited no authority from this Court for the proposition that FELA incorporated a common-law conception of proximate cause, despite what petitioner here claims are more than 20 pre-*Rogers* cases so holding. *See* Resp. Br. 22-23, *Rogers*, *supra* (filed Sept. 15, 1956) (relying on cases from the Third, Fourth, and Eighth Circuits in arguing that proximate cause was lacking).

Fourth, petitioner argues that *Rogers* could not have intended to recognize a relaxed proximate-cause standard in FELA because it cited prior FELA decisions that supposedly "recognized proximate cause as the standard applicable in FELA suits." Br. 40-41 (quoting *Sorrell*, 549 U.S. at 175-76 (Souter, J., concurring)). But there is no inconsistency between *Rogers*' holding and the cases it cited. *Coray* supported the *Rogers* Court's understanding of FELA's causation standard. *See supra* pp. 25-27.[6] The other two cases, *Carter* and *Tiller*, were cited for holdings unrelated to causation. *See Rogers*, 352 U.S. at 507 n.13 (citing *Carter*'s holding that "[p]roof of violation of certain safety-appliance statutes" establishes negligence as a matter of law); *id.* at 507-08 & n.16 (citing *Tiller* for proposition that FELA "strip[s]" railroad of its "common-law defenses"). Although the words "proximate cause" appear in the opinions in those cases, neither analyzed the meaning of those words, let alone established a causation standard inconsistent with *Rogers*' holding. Petitioner's suggestion that *Rogers*' citation to *Carter* and *Tiller* for wholly unrelated points implied wholesale approval of passing references to proximate causation in those opinions has no merit.

Fifth, petitioner contends (at 41-42) that the dissenting justices in *Rogers* and its companion cases believed the Court was applying settled law to particular factual circumstances. On the contrary, Justice Harlan argued that the Court's discussion of "the element of causation" incorrectly "departed

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[6] The respondent in *Sorrell* did not discuss the most relevant passages of *Coray* or cite any of the other pre-*Rogers* cases that departed from the common-law proximate-causation requirement.

from" "common-law rules." 352 U.S. at 564 (Harlan, J., concurring and dissenting). For his part, Justice Frankfurter appeared to recognize the correctness of the Court's analysis of FELA causation in *Rogers*. He explained that, "on the question of casualty," FELA did not reflect a "statutory absorption of the common-law concept." *Id.* at 538 & n.7 (Frankfurter, J., dissenting). Rather, in his view, FELA addressed "the requirement of a causal relation with the language that the injury must result 'in whole or in part' from the employer's negligence." *Id.*

Unlike petitioner today, contemporary readers of *Rogers* readily grasped the holding. The Association of American Railroads ("AAR")—an *amicus* in support of petitioner here—submitted an *amicus* brief supporting the railroad's rehearing petition in *Rogers*. Although AAR took issue with several aspects of this Court's decision in *Rogers*, it did not dispute that FELA's causation standard did *not* incorporate traditional common-law notions of proximate cause:

> There was, of course, much metaphysical formalism in the development of the common-law principle of "proximate causation," in the talk about "causa causans," "sole, active, efficient, proximate cause," and other like expressions. Unquestionably Congress, by writing the words "in whole or in part" into this statute, made very substantial modifications in the common-law doctrine of proximate causation. One can hardly confine causation to what is "proximate" in the common-law sense when the statute imposes liability for negligence from which the casualty resulted "in whole or in part."

AAR Amicus Br. in Support of Said Pet. for Rehearing 11, *Rogers*, *supra* (filed Apr. 22, 1957).

In sum, petitioner's arguments that *Rogers* did not reject common-law notions of proximate cause are unpersuasive.

C. The Pre-*Rogers* Cases On Which Petitioner Relies Do Not Support Its Argument

Contrary to petitioner's claim (at 27-33), this Court's pre-*Rogers* FELA jurisprudence had not developed a settled understanding of FELA causation that *Rogers* could have "overruled" (Pet. Br. 34). The pre-*Rogers* cases that focused on the issue interpreted FELA to adopt a causation standard that does *not* include common-law notions of proximate cause. *See supra* pp. 22-26 (discussing *Campbell*, *Harrell*, *Hadley*, and *Coray*).

The remaining cases contain no sustained analysis of proximate cause. In some, "proximate cause," or some variant of it, appears in the Court's opinion, but the decision turns on a different issue.[8] In others, the Court used the words "proximate cause" while determining that any negligence of the railroad was too factually attenuated because the harm would have occurred for some other reason regardless of the

[8] *See Brady v. Southern Ry. Co.*, 320 U.S. 476, 483 (1943) (holding that equipment in question was fit for ordinary use and therefore that railroad satisfied its duty of "due care"); *New York Cent. R.R. Co. v. Ambrose*, 280 U.S. 486, 489 (1930) ("[T]here must be a reversal because the evidence fails to establish negligence on the part of the railroad company."); *Delaware, L. & W. R.R. Co. v. Koske*, 279 U.S. 7, 11-12 (1929) ("[t]he evidence is not sufficient to warrant a finding that defendant was guilty of any breach of duty owed to plaintiff"); *Tiller v. New York Cent. R.R. Co.*, 255 U.S. 445, 439-40 (1921) (holding that employee could not base his claim on railroad's violation of the SAA because his injury was not of a kind the Act was intended to prevent).

railroad's conduct.[26] Such cases are fully consistent with the relaxed form of FELA proximate cause recognized in *Rogers* and subsequent cases. *See supra* p. 31 n.19. Some cases indicated approval of some generic notion of "proximate cause," but they contained no discussion of the content of those words in a FELA action.[27] Finally, in many of the cases petitioner cites, the Court upheld jury verdicts for employees or reversed directed verdicts for railroads, making any mention of "proximate cause" unnecessary to the outcome.[28]

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[26] *See St. Louis San Francisco Ry. Co. v. Mills*, 271 U.S. 344, 346-47 (1926) (stating that there was no evidence that failure to provide an additional guard to protect decedent from violence by striking workers was "the proximate cause of decedent's death" because there was no evidence that an additional guard would, in fact, have prevented the death); *St. Louis, Iron Mountain & S. Ry. Co. v. McWhirter*, 229 U.S. 265, 281-82 (1913) (finding "no proof tending to show a connection between" violation of the safety regulation and employee's death).

[27] *See Reynolds v. Atlantic Coast Line R.R. Co.*, 336 U.S. 207, 208 (1949) (per curiam) (summarily concluding that lower court did not err in holding that "the facts alleged did not show that the accident resulted proximately, in whole or in part, from [railroad's] negligence"); *Northwestern Pac. R.R. Co. v. Bebo*, 290 U.S. 439, 303-04 (1934) (holding that employee "assumed any alleged risk", also stating that, if railroad was negligent, "there is nothing whatsoever to show that this was the proximate cause of the unfortunate death").

[28] *See Carter*, *supra*; *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384 (1949); *Urie*, *supra*; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1944); *Tiller*, *supra*; *Brady v. Terminal R.R. Ass'n of St. Louis*, 303 U.S. 10 (1938); *Swanson v. Chicago, St. P., M. & O. Ry. Co.*, 294 U.S. 529 (1935); *Minneapolis, St. P. & S.S.M. Ry. Co. v. Gotsch*, 285 U.S. 406 (1932); *Davis v. Wolfe*, 263 U.S. 239 (1923); *Louisville & N. R.R. Co. v. Layton*, 243 U.S. 617 (1917); *Norfolk & W. Ry. Co. v. Earnest*, 229 U.S. 114 (1913).

Tennant, which petitioner cites (at 27, 32-33), is illustrative of the passing usage of "proximate cause" in many cases invoked by petitioner. There, the court of appeals had reversed a jury verdict for the employee on the ground that "there was no substantial proof that [the railroad's] negligence was the proximate cause of Tennant's death." 321 U.S. at 30. This Court, in turn, reversed, holding that there was sufficient proof of "proximate cause." The Court's opinion provided no definition of "proximate cause." And, in weighing the evidence, it conflated "proximate cause" with "but for" cause, concluding that the evidence supported "[t]he ultimate inference that Tennant would not have been killed *but for* the [railroad's negligence]." *Id.* at 34 (emphasis added).

These cases exemplify the reasons for this Court's well-settled rule that passing *dicta* should not be given precedential effect. Because these cases did not focus on the meaning of proximate cause under FELA, they cannot establish that Congress incorporated common-law proximate cause as an element of a FELA claim.

D. Petitioner's Analogies To Other Statutes Are Unpersuasive

Petitioner's reliance (at 47-48) on proximate-cause requirements in antitrust, civil RICO, and securities-fraud actions is misplaced. First, none of those statutes contains FELA's "in whole or in part" language, which is inconsistent with common-law proximate-cause limitations. Indeed, much of this Court's recent proximate-cause case law in those areas rests on *Southern Pacific*'s maxim that the common law does not look beyond the "first step" in the causal chain. *See Holmes*, 503 U.S. at 271 (internal quotations omitted); *Associated Gen. Contractors of Cali-*

fornia, Inc. v. California State Council of Carpenters, 459 U.S. 519, 534 (1983). Yet this Court rejected that standard in *Hadley* based on FELA § 1's plain text. *See supra* pp. 23-24.

Moreover, FELA § 1 differs fundamentally from those statutory rights of action. Antitrust, RICO, and securities-fraud violations "may be expected to cause ripples of harm to flow through the Nation's economy." *Associated Gen. Contractors*, 459 U.S. at 534 (internal quotations omitted). Because those statutes do not expressly limit the plaintiffs authorized to bring suit, an expansive interpretation of causation risks "fill[ing] the courts with endless litigation" by a theoretically infinite number of indirectly affected parties. *Holmes*, 503 U.S. at 266 n.10 (internal quotations omitted). It was thus unsurprising that the Court found evidence in the legislative history of each statute of congressional intent to limit the class of affected parties eligible to bring claims under it. *See Associated Gen. Contractors*, 459 U.S. at 531, 533-34; *Holmes*, 503 U.S. at 267-68.

FELA's structure is wholly different. Railroad negligence does not typically create broad-based harm to large numbers of people. Moreover, FELA limits the class of potential plaintiffs to rail workers. *See* 45 U.S.C. § 51. Unsurprisingly, therefore, FELA's legislative history—unlike the Clayton Act's and RICO's—contains no indication that Congress intended courts to engraft common-law requirements onto the statutory cause of action to further limit the class of employees who may recover for injuries caused by their employers' negligence.[20]

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[20] The Court's related concern in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), which led it to require plaintiffs

III. STATUTORY *STARE DECISIS* SUPPORTS ADHERENCE TO THE *ROGERS* STANDARD

For more than 50 years, *Rogers* has provided a stable, workable standard for causation in FELA cases. Based on *Rogers* and FELA § 1's text, every federal circuit has held that FELA requires a more relaxed causation standard than common-law proximate cause. *See supra* p. 27 n.18. The overwhelming majority of states have done the same.[30] Jurisdictions across the country have adopted pattern jury instructions for FELA cases that track *Rogers*.[31] And

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to prove "loss causation" (which the Court described as an aspect of "proximate cause"), is inapposite for the additional reason that it dealt with "the contours of a *judicially implied* cause of action," *id.* at 345 (emphasis added)—not, as here, an express statutory right of action.

[30] *See* App. 34a-35a n.7 (rejecting petitioner's arguments regarding Iowa, Minnesota, and Ohio, and concluding that only Utah, Montana, and West Virginia apply common-law proximate cause in FELA cases). Petitioner now erroneously cites Alabama law. *See CSX Transp., Inc.* v. *Miller*, 46 So. 3d 434, 461 (Ala. 2010) ("the test of a jury case is simply whether . . . employer negligence played any part, even the slightest, in producing the injury or death") (quoting *Gottshall*, 512 U.S. at 543).

[31] *See, e.g.*, *Fifth Circuit Pattern Jury Instructions—Civil*, Instruction No. 5.1 (2009); *Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit*, Instruction No. 7.01 (2011); *Ninth Circuit Manual of Model Jury Instructions—Civil*, Instruction No. 6.4 (2007); *Eleventh Circuit Pattern Jury Instructions (Civil Cases)*, Instruction No. 7.1 (2005); 5 *Modern Federal Jury Instructions—Civil*, Instruction 89-2 (2009); *California Civil Jury Instructions (BAJI)*, Civ. 11.14 (2010); *Judicial Council of California Civil Jury Instructions*, CACI No. 2903 (2010); *Illinois Pattern Jury Instructions—Civil*, No. 160.01 (2009); *New York Pattern Jury Instructions—Civil*, PJI 2:180 (2010); *Draft Pattern Jury Instructions for Cases of Railroad Employee Personal Injury for the District Courts of the*

numerous courts have rejected jury instructions founded on common-law precepts of "proximate cause."[32] Thus, the relaxed standard of causation that this Court recognized in *Rogers* has become entrenched in FELA jurisprudence.[33]

The purpose of *stare decisis* is to "promote[] stability, predictability, and respect for judicial authority." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (calling the doctrine of "fundamental importance to the rule of law") (internal quotations omitted). Petitioner does not purport to offer any "compelling justification" for disturbing this well-settled rule of law. *Id.* It offers no "intervening development of the law [that] has 'removed or weakened the conceptual underpinnings from the prior decision,'" and no reason to believe that the *Rogers* test has become unworkable. *Neal v. United States*, 516 U.S. 284, 295 (1996) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989)). Notably, petitioner offers no case demonstrating that the *Rogers* standard has led to unreasonable results.

Moreover, "*[s]tare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous

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United States Court of Appeals for the First Circuit, Instruction No. 1.1 (July 15, 2010).

[32] *See, e.g., Page v. St. Louis Sw. Ry. Co.*, 312 F.2d 84, 91-92 (5th Cir. 1963); *DeLima v. Trinidad Corp.*, 302 F.2d 585, 587-88 (2d Cir. 1962) (Marshall, J.); *Hoyt v. Central R.R.*, 243 F.2d 840, 843 (3d Cir. 1957) ("Any instructions to the jury on the element of proximate causation must necessarily define liability to include a greater area than that at common law.").

[33] *See also* William H. DeParcq, *Litigation Under the Federal Employers' Liability Act* § 180 (1966) ("it is now error to instruct a jury, in the traditional language of proximate cause").

decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." *Hilton*, 502 U.S. at 202 (upholding application of FELA to state-owned railroads). Such reliance interests are at stake here. Rail workers are not covered by any workers' compensation scheme and have relied for decades on FELA and its relaxed causation standard to compensate them for injuries resulting from railroad negligence. *See id.* (noting that many state workers' compensation laws exclude rail workers on "the assumption that FELA provides adequate protection"); *GAO Report* at 12. If this Court alters FELA's long-settled causation standard, it will "dislodge" rail workers' settled expectations regarding compensation for workplace injuries and necessitate "an extensive legislative response" at both the state and federal levels. *Hilton*, 502 U.S. at 202.

There is no reason to take that drastic step. The *Rogers* standard has promoted stability and predictability by avoiding the varied and confusing common-law proximate-causation instructions. *See Sorrell*, 549 U.S. at 180 & n.2 (Ginsburg, J., concurring in the judgment) ("If the term 'proximate cause' is confounding to jurists, it is even more bewildering to jurors.") (citing authorities); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306, 1353 (1979) (noting that 23% of subjects interpreted "proximate cause" as "'approximate cause,' 'estimated cause,' or some fabrication," and that "the phrase 'in natural and continuous sequence' produced a whole variety of misunderstandings"). In contrast to the uniformity in FELA instructions, none of the federal circuits has

promulgated model jury instructions for common-law proximate cause, the Seventh Circuit has expressly declined to do so because "[t]here is no consistent causation standard for either federal or state claims."[34] State-law proximate-cause standards vary and are subject to change.[35] Accepting petitioner's invitation (at 19 n.3) to upend *Rogers* in favor of a "proximate causation" standard with some unknown "common law" meaning will create disuniformity and embroil rail workers, railroads, and the courts in unnecessary and protracted litigation about the proper causation instructions under FELA. For example, instructing juries to find for the defendant if its negligence was not a "substantial factor" in the employee's injury would create tremendous confusion. Under FELA § 3, employee negligence reduces, but does not eliminate, recovery under the Act, even where the employer's negligence played a relatively small role. However, a "substantial factor" proximate-cause instruction may lead the jury not to find proximate causation (and thus deny liability altogether) in such a situation, contrary to FELA's text and structure.

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[34] *Federal Civil Jury Instructions of the Seventh Circuit*, Instruction No. 1.30 (2009 rev.).

[35] For example, a Nebraska plaintiff must show that "the injury is the natural and probable result of the negligence" and that "there is no efficient intervening cause." *Heatherly* v. *Alexander*, 421 F.3d 638, 641-42 (8th Cir. 2005). A Tennessee plaintiff must show that the tortfeasor's conduct was "a 'substantial factor' in bringing about the harm", "there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence had resulted in harm", and the harm "could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence." *Kellner* v. *Budget Car & Truck Rental, Inc.*, 359 F.3d 389, 406 (6th Cir. 2004) (internal quotations omitted).

Adherence to *Rogers*' correct interpretation of FELA § 1 is especially appropriate given that Congress has had more than 50 years to express its disapproval of that well-settled standard. *See Patterson*, 491 U.S. at 172-73 (for statutory construction, "the burden borne by the party advocating the abandonment of an established precedent is greater" because "Congress remains free to alter what [the Court] ha[s] done"). Despite wide-ranging debate regarding whether FELA should be abandoned for workers' compensation, Congress never has seen fit to do so. *See Hilton*, 502 U.S. at 202 (relying on 30 years of congressional acquiescence); *Federal Employers' Liability Act: Hearing Before the Subcomm. on Transportation and Hazardous Materials of the H. Comm. on Energy and Commerce*, 101st Cong. 131-38 (1989) (testimony that relaxed FELA causation standard meant substitute rail workers' compensation scheme unwarranted). In *Hilton*, this Court upheld another longstanding interpretation of FELA in *Parden v. Terminal Railway of Alabama State Docks Department*, 377 U.S. 184 (1964), citing parties' reliance on that decision and Congress's acquiescence to it over nearly three decades. This Court should reach the same conclusion here.[36]

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[36] If the Court concludes that the district court should have instructed the jury regarding proximate cause, respondent should be permitted to argue on remand (as he did in the court below) that the failure to give petitioner's proposed instruction was harmless error.

Respectfully submitted,

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REPLY BRIEF

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CSX TRANSPORTATION, INC.,

Petitioner,

v.

ROBERT McBRIDE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER[1]

Just weeks ago, this Court again applied the principle that "when Congress creates a federal tort it adopts the background of general tort law." *Staub* v. *Proctor Hosp.*, 131 S. Ct. 1186, 1191 (2011). In particular, the Court held that a statute requiring a causal relationship between the defendant's conduct and the plaintiff's injury "incorporates the traditional tort-law concept of proximate cause." *Id.* at 1193. There is no reason for a different result here.

One of McBride's principal contentions is that FELA does not require proof of proximate cause—and so employees may recover for indirectly or remotely caused injuries—because the statute authorizes recovery for injuries "resulting in whole or *in part*" from the railroad's negligence. That theory has a number of flaws. First and foremost, this Court has already interpreted "in whole or in part" to address multiple causes, not the requisite directness of a cause. Pre-FELA common-law cases, moreover, used "in whole or in part" in conjunction with proximate cause, not in opposition to it. Last but certainly not least, this Court has required proximate causation in more than 20 FELA cases.

McBride's other main argument is that Congress could not have intended to adopt a common-law concept, like proximate cause, that courts have described in varying terms. That reasoning is no less flawed. This Court has routinely interpreted statutes to incorporate common-law concepts that have

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[1] The Corporate Disclosure Statement in the opening brief remains accurate.

different formulations, including in cases in which the statute was FELA or the common-law concept was proximate cause. McBride's approach would mean rejecting a settled principle applied in *every* jurisdiction at the time of FELA's enactment. In any event, this Court has long since decided upon the proximate-cause formulation that applies in FELA cases. And McBride offers no meaningful standard with which he would replace it.

Though we made most of these points in our opening brief, McBride ignores a number of them. And his responses to the others are unpersuasive—particularly his astonishing assertion that this Court did not in fact apply proximate cause in nearly two dozen FELA cases but just made "offhand references" to it, a claim with which even the court of appeals disagreed. Nor does McBride provide any other basis for affirming the decision below.

A. Proximate Causation Is Required Under The Established Interpretive Methodology

This Court has squarely held that, "[a]bsent express language to the contrary, the elements of a FELA claim are determined by reference to the common law." *Norfolk S. Ry.* v. *Sorrell*, 549 U.S. 158, 165-166 (2007). "Prior to FELA, it was clear common law that a plaintiff had to prove that a defendant's negligence caused his injury proximately, not indirectly or remotely," and "FELA said nothing *** about the familiar proximate cause standard." *Id.* at 173-174 (Souter, J., joined by Scalia and Alito, JJ., concurring). Under the established interpretive methodology, therefore, FELA requires proof of proximate causation. Nothing that McBride or his *amici* say undermines this straightforward analysis.

1. McBride contends that Congress did not intend to require proximate causation because it used the phrase "resulting in whole or in part" in Section 1 of FELA, RB16-17, and a defendant's negligence "can be 'in part' responsible if it produces the injury *** indirectly," RB19.[2] But this Court adopted a different view in *Sorrell*—that "in whole or in part" concerns multiple causes rather than the necessary directness of a cause. As the decision explains, those words in FELA "make clear that there could be recovery against the railroad even if it were only partially negligent" and "reflect the fact that contributory negligence is no longer a complete bar to recovery." 549 U.S. at 170-171. Though it was highlighted in our opening brief, PB24-25, McBride completely ignores *Sorrell*'s interpretation of the statutory language.

McBride also contends that Congress's use of "contributed" in Section 3 of FELA—the contributory-negligence provision—"confirms" that an employee may recover for indirectly or remotely caused injuries. RB17. But *Sorrell* determined that "Section 3 simply does not address causation"—*i.e.*, the requisite directness of a cause. 549 U.S. at 171. Particularly in a provision dealing with "contributory negligence," the word "contributed"—like the concept of contributory negligence itself (and like the words "in whole or in part")—addresses the issue of multiple causes.

McBride's other arguments cast no doubt on the soundness of *Sorrell*'s interpretation. McBride argues, for example, that FELA does not require

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[2] We cite petitioner's opening brief as "PB__" and respondent's brief as "RB__."

proximate causation because "Congress did not use the phrase 'proximate cause'" or its equivalent in the statute. RB17. This gets things backwards. The governing interpretive rule is that FELA incorporates common-law principles unless its text expressly provides otherwise, PB19-21, not that it *rejects* those principles unless the principle is explicitly *mentioned*. The antitrust, RICO, and securities statutes do not mention proximate cause either, yet this Court, employing a similar methodology, has interpreted them to incorporate the requirement. PB47-48. As in *Sorrell*, the fact that "the statutory text is silent" on the issue, 549 U.S. at 171, means that FELA embodies the common-law rule, not that it abandons it.

McBride also argues that "common-law concepts of 'proximate causation'" "cannot be squared with" the words "in whole or in part." RB18. In fact, the common-law rule is easily squared with the statutory text, so long as one interprets "in whole or in part," as *Sorrell* did, to address multiple causation. The correctness of that interpretation is confirmed by the pre-FELA common-law decisions of state courts (as well as subsequent FELA decisions of this Court) that used the phrase "proximate cause in whole or in part" (or some variation of it). PB25-26 & n.5, 28. Those decisions refute McBride's assertion that the phrase "in whole or in part" has "no common-law antecedent." RB1. More to the point, they refute his assertion that "in part" means "indirectly," RB19, because, if it did, "proximate cause in whole or in part" would be nonsensical.

McBride argues that "in part" was not contemporaneously understood to address multiple causes, citing pre-FELA common-law cases from California and

Massachusetts that used "in whole or in part" "without reference to 'proximate cause.'" RB19n.15. But those decisions cannot support McBride's contention that "in part" allows recovery for indirectly or remotely caused injuries, since proximate cause was part of the common law of those States (as well as every other). See, e.g., *Anderson* v. *Seropian*, 81 P. 521, 527 (Cal. 1905); *Garant* v. *Cashman*, 66 N.E. 599, 600 (Mass. 1903). Nor does McBride identify any other usage of "in whole or in part" in the late nineteenth or early twentieth century (or at any other time) that is inconsistent with proximate causation.

McBride attempts to distinguish this case from others that have construed FELA to incorporate a common-law rule. He contends that, in those cases, unlike in this one, "the Court rooted its incorporation of common-law rules in FELA's codification of the terms 'negligence,' 'injury,' and 'damages.'" RB39. But this case is no different: the common-law rule of proximate causation is incorporated in FELA's codification of the term "resulting *** from," which describes the element of causation. The Court has interpreted the similar phrase "by reason of" in the antitrust and RICO statutes to incorporate proximate causation, 15 U.S.C. § 15(a); 18 U.S.C. §1964(c); PB47-48, and there is no less reason to interpret "resulting *** from" in FELA the same way.

If anything, there is more reason. Contrary to McBride's suggestion, RB39-40, this Court has not interpreted FELA to incorporate common-law principles because Congress used particular words. It has done so because "Congress expressly dispensed with [certain] common-law doctrines" in FELA but "did not deal at all with [other] equally well-

established doctrine[s]," and thus the Court presumes that Congress did not "intend[] to abrogate [the latter] doctrine[s] *sub silentio*." *Monessen Sw. Ry.* v. *Morgan*, 486 U.S. 330, 337-338 (1988). Proximate causation is one such well-established doctrine.

2. McBride also contends that proximate causation is not required because "there was no consensus on the meaning of proximate cause at common law when Congress enacted FELA." RB41. This asserted "uncertainty," according to McBride, "negates any reliable inference *** about what legal concepts Congress incorporated." RB41-42.

But common-law courts routinely employ somewhat different formulations in applying particular negligence concepts. If the existence of multiple formulations of a concept were a reason to reject the presumption that a statute incorporates common-law principles, the presumption would cease to function as a meaningful interpretive rule. If McBride's position were correct, for example, it would mean that this Court erred in holding that the antitrust, RICO, and securities statutes require proximate cause. PB47-48. It also would mean that, even though "[a] right to recover for negligently inflicted emotional distress was recognized *in some form* by many American jurisdictions at the time FELA was enacted," *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 550 (1994) (emphasis added), the Court was wrong to hold in *Gottshall* that "claims for damages for negligent infliction of emotional distress are cognizable under FELA," *ibid.*, because no fewer than "[t]hree [different] major limiting tests for evaluating claims alleging negligent infliction of emotional distress ha[d] developed in the common law," *id.* at 546.

McBride contends that it is especially "implausible that Congress *** incorporated into FELA *** a *** concept that *limits* a defendant's liability given the clear statutory purpose to *broaden* railroads' liability for negligence to workers." RB42. But Congress's incorporation of proximate causation is not implausible at all, inasmuch as FELA is "an avowed departure from the rules of the common law" "*[o]nly* to the extent of the[] explicit statutory alterations" that "did away with [the] common-law tort defenses that had effectively barred recovery by injured workers." *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 145 (2003) (quoting *Gottshall*, 512 U.S. at 542, 544, in turn quoting *Sinkler* v. *Mo. Pac. R.R.*, 356 U.S. 326, 329 (1958)) (emphasis added).

McBride chides us for supposedly failing to offer "guidance about the content" of the proximate-cause standard in FELA cases. RB42. But there is no need for *us* to provide that guidance, because this Court has already done so, explaining in *Brady* v. *Southern Railway*, 320 U.S. 476 (1943), that "negligence *** is the proximate cause of an injury" under FELA when the injury is "the natural and probable consequence of the negligence." *Id.* at 483 (quoting *Milwaukee & St. Paul Ry.* v. *Kellogg*, 94 U.S. 469, 475 (1876)). Remarkably, while seeking to persuade this Court that there is "pervasive disagreement and uncertainty over 'proximate causation' requirements," RB41, and indeed that a ruling in CSXT's favor "would open thousands of cases to appellate litigation over which proximate-cause instruction best comports with Congress's intent," RB2, McBride ignores this language in *Brady*—even though we quoted it twice in our opening brief, PB18, 28. McBride's *amici* make similar arguments, but do not cite *Brady* at all.

This case is thus even more straightforward than *Gottshall*, where the Court was required to decide whether negligent infliction of emotional distress is actionable under FELA and then to choose a particular test. Here, the Court need only reaffirm what it has already said, about both the need to prove proximate causation and its meaning.

It is particularly odd for McBride to protest that common-law proximate causation—a bedrock principle of Anglo-American negligence law with which judges and juries have centuries of experience—somehow affords inadequate guidance. For McBride refuses to specify the standard with which he would replace it.

The law of torts recognizes two types of causation: "but for" and proximate. McBride asserts that common-law proximate causation is not necessary under FELA, but he does not go so far as to say that "but for" causation is sufficient, apparently appreciating that such a position would be revolutionary. He seems to advocate an intermediate standard: one that is "more *** lenient *** than those prevalent in common-law negligence cases," RB17n.14, but nevertheless does not "equate[] to 'but for' cause," RB31n.19. Yet he does not explain what that standard is; where it comes from; how it would be formulated or administered; or why, uniquely among common-law and statutory negligence regimes, FELA should be interpreted to reject not only traditional proximate causation but also "but for" causation. Nor does he explain either how a standard more lenient than common-law proximate causation can be reconciled with *Brady* or how one stricter than "but for" causation can be reconciled with his own position that the statutory

language "in part" allows recovery for indirectly or remotely caused injuries.

All that McBride is willing to say is that his "more relaxed" standard will allow judges and juries to find in "extreme cases" that the causal connection between the defendant's negligence and the plaintiff's injury is "so attenuated" that recovery should be denied. RB31n.19. That is no standard at all. And it is yet another reason to conclude that, consistent with the established interpretive methodology and this Court's precedents, FELA incorporates the common-law principle of proximate cause.

B. Proximate Causation Is Required Under This Court's Precedents

1. Pre-*Rogers* decisions

a. In more than 20 cases decided between FELA's enactment and the decision in *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957), this Court "consistently recognized and applied proximate cause as the proper standard in FELA suits." *Sorrell*, 549 U.S. at 174 (Souter, J., joined by Scalia and Alito, JJ., concurring). The Court has viewed the need to prove proximate cause as so obvious that it "require[s] no reasoning to demonstrate," *St. Louis, Iron Mountain & S. Ry.* v. *McWhirter*, 229 U.S. 265, 280 (1913), and has articulated the standard in no uncertain terms, explaining that it is "incumbent" upon a FELA plaintiff to prove that the defendant's "negligence was the proximate cause in whole or in part of the *** accident," *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944). The Court has said that negligence is "the proximate cause of an injury" under FELA when the injury is "the natural and

probable consequence of the negligence," *Brady*, 320 U.S. at 483, and has contrasted such actionable negligence with negligence that "merely creates an incidental condition or situation in which the accident *** results in [the] injury," *Davis* v. *Wolfe*, 263 U.S. 239, 243 (1923).

According to McBride, none of the cases on which we rely "contain [any] sustained analysis of proximate cause," RB47, or employ anything more than "passing *dicta*," RB49. But even the court of appeals recognized that this Court's "[e]arly FELA cases" held that plaintiffs must satisfy "the common-law requirement of proximate cause." Pet.App.9a. Likewise, while some other circuits have held that FELA *no longer* requires proof of proximate cause (because of *Rogers*), they have conceded that early decisions of this Court interpreted FELA to require such proof. See, *e.g.*, *Page* v. *St. Louis Sw. Ry.*, 312 F.2d 84, 88 & n.2 (5th Cir. 1963); *Summers* v. *Mo. Pac. R.R.*, 132 F.3d 599, 606 (10th Cir. 1997). Those acknowledgments are understandable, since even the most cursory perusal of the decisions cited above refutes McBride's assertion.

The same is true of the other decisions cited in our opening brief. PB27-33 & nn.6-7. To take just four representative examples: *Lang* v. *New York Central Railroad*, 255 U.S. 455, 461 (1921), held that the employee could not recover because "the collision was not the proximate result of" the defect (even though the collision "would not have resulted in the injury" if the Safety Appliance Act had "been complied with"). *Urie* v. *Thompson*, 337 U.S. 163, 177 (1949), held that the employee's complaint "stat[ed] a cause of action" under FELA because "[a]ll the usual elements [we]re comprehended," including "prox-

imate causation." *O'Donnell* v. *Elgin, Joliet & Eastern Railway*, 338 U.S. 384, 394 (1949), held that the employee was "entitled" to a jury instruction that the railroad was liable for "injuries proximately resulting" from a violation of the Safety Appliance Act. And *Carter* v. *Atlanta & St. Andrews Bay Railway*, 338 U.S. 430, 433, 435 (1949), reversed the lower court's decision that the railroad's negligence was "the remote, not the proximate, cause of plaintiff's injuries" on the ground that there was sufficient evidence that the negligence was "a contributory proximate cause" of the injuries. No reasonable reader of these decisions—or of the others—could conclude that they merely "reflect offhand references" to proximate cause. RB14.

b. McBride does not just deny that this Court's decisions "applied proximate cause as the proper standard in FELA suits." *Sorrell*, 549 U.S. at 174 (three-Justice concurrence). He argues that "pre-*Rogers* cases that focused on the issue interpreted FELA to adopt a causation standard that does *not* include common-law notions of proximate cause." RB47. But the cases he cites, RB22-26, provide no support for that view.

The first, *Spokane & Inland Empire Railroad* v. *Campbell*, 241 U.S. 497, 510 (1916), said that a FELA plaintiff may recover when "plaintiff's contributory negligence and defendant's violation of a provision of the safety appliance act are concurring proximate causes." As McBride acknowledges, that simply reflects a recognition that "FELA abandoned the common-law 'sole proximate cause' rule," RB23, and allows recovery when the railroad's negligence is *a* proximate cause of the employee's injury (even if there is another proximate cause). *Campbell* thus

supports our position, not McBride's. The same is true of *Union Pacific Railroad* v. *Hadley*, 246 U.S. 330, 333 (1918), which merely rejected the argument that "the only proximate cause of [the employee's] death was his own neglect of duty," concluding, instead, that a jury could find that the railroad's negligence was a proximate cause as well.

McBride's insistence that *Coray* v. *Southern Pacific Co.*, 335 U.S. 520 (1949), "rejected incorporation of common-law proximate-cause requirements into FELA," RB25, is equally puzzling, because *Coray* involved a straightforward application of those requirements. PB31-32. It expressly stated that FELA authorizes recovery when the railroad's negligence "was the sole or a contributory proximate cause" of the employee's injury; it cited two of this Court's early proximate-cause decisions; and it held that the jury could find proximate cause because the negligence and injury "were inseparably related to one another in time and space." 335 U.S. at 523-524. McBride's strained efforts to explain how *Coray* actually applied a standard *different* from traditional proximate cause, RB25-26, depend on the same sort of "dialectical subtleties" of which the Court disapproved in that case, 335 U.S. at 524.

McBride and one of his *amici* also cite a number of pre-*Rogers* decisions that did not explicitly mention proximate cause. RB24 & n.16; ARLA Br. 7-8. But those cases did not say, or even suggest, that FELA adopted a different standard. On the contrary, all but one of them cited decisions that applied the proximate-cause requirement.[3]

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[3] See *Baltimore & Ohio R.R.* v. *Groeger*, 266 U.S. 521, 528 (1925) (citing *Louisville & Nashville R.R.* v. *Layton*, 243 U.S.

In the end, McBride's position seems to be that, when this Court said—over and over, and as clearly as possible—that a FELA cause of action, like a common-law cause of action, requires proof of proximate causation, it did not really mean what it said. But of course the Court meant what it said. On the question whether pre-*Rogers* FELA decisions "recognized and applied" common-law proximate causation, McBride is wrong, and Justices Souter, Scalia, and Alito are right. *Sorrell*, 549 U.S. at 174 (concurring opinion).

2. *Rogers*

a. "*Rogers* left this law where it was." *Sorrell*, 549 U.S. at 174 (Souter, J., joined by Scalia and Alito, JJ., concurring). It "did not address *** the necessary directness of cognizable causation, as distinct from the occasional multiplicity of causations." *Id.* at 175 (three-Justice concurrence). *Rogers* "spoke to apportioning liability among parties, each of whom *** had some hand in causing damage directly enough to be what the law traditionally called a proximate cause." *Ibid.*

Disagreeing with this understanding of the case, McBride contends that "*Rogers*' holding was not limited to the issue of contributory negligence or 'multiple causes.'" RB30. The sum total of his support for that contention is a single sentence in *Rogers*'

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617 (1917)); *Chicago, Milwaukee & St. Paul Ry.* v. *Coogan*, 271 U.S. 472, 474, 478 (1926) (citing *McWhirter* and *St. Louis-San Francisco Ry.* v. *Mills*, 271 U.S. 344 (1926)); *Atchison, Topeka & Santa Fe Ry.* v. *Toops*, 281 U.S. 351, 355 (1930) (citing *Mills* and *N.Y. Cent. R.R.* v. *Ambrose*, 280 U.S. 486 (1930)); *Bailey* v. *Cent. Vt. Ry.*, 319 U.S. 350, 352-353 (1943) (citing *Tiller* v. *Atl. Coast Line R.R.*, 318 U.S. 54 (1943)); *Moore* v. *Chesapeake & Ohio Ry.*, 340 U.S. 573, 575 (1951) (citing *Tennant*).

one-paragraph explanation of why "the evidence was sufficient to support the jury finding for the petitioner." *Rogers*, 352 U.S. at 503. That sentence reads as follows: "In this view, it was an irrelevant consideration whether the immediate reason for [petitioner's] slipping off the culvert was the presence of gravel negligently allowed by respondent to remain on the surface, or was some cause not identified from the evidence." *Ibid.* According to McBride, "[t]he Court's statement that it was 'irrelevant' *** whether the negligently maintained gravel or some other factor was the 'immediate' cause of Rogers' injuries plainly relaxed the common-law standard regarding the directness of the cause." RB30-31 (citation omitted).

As this Court has held, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). The same can be said of this Court's decisions. Before *Rogers*, the Court "consistently recognized and applied proximate cause as the proper standard in FELA suits." *Sorrell*, 549 U.S. at 174 (three-Justice concurrence). That a single, rather opaque, sentence in a paragraph describing the evidence that permitted a jury finding for the plaintiff could have had the effect of overruling more than 20 decisions on that point is far-fetched, to put it mildly.

But it is not just far-fetched; McBride's theory fails on its own terms. Because "it is common for injuries to have multiple proximate causes," *Staub*, 131 S. Ct. at 1192, a proximate cause cannot be limited to the "immediate" cause, of which there is necessarily "only one," *Clinton* v. *Gunn-Willis Lumber Co.*, 49 S.E.2d 143, 149 (Ga. Ct. App. 1948). That is doubt-

less one reason why, while there may have been "confusion about this in the distant past," courts "have long since ceased to pay attention to" the "immediate cause" formulation. W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 42, at 276-277 (5th ed. 1984). Indeed, CSXT's proffered instructions in this case would have informed the jury that a proximate cause "need not be *** the last or nearest cause." JA32a. Even if *Rogers* rejected "immediate" causation, therefore, that does not establish that it rejected proximate causation. And McBride identifies no other basis for concluding that it did.

b. Far from having abandoned proximate cause, *Rogers* assumed that FELA requires it. As our opening brief explains, that is true for four reasons. PB39-43. McBride takes issue with each of them, RB43-46, but his arguments are unpersuasive

First, the jury charge in *Rogers* "covered the requirement to show proximate cause." *Sorrell*, 549 U.S. at 176 (three-Justice concurrence). McBride argues that "*Rogers* signaled no approval of th[e] quoted instruction." RB43. But the point is not that the Court affirmatively *approved* the instruction. The point is that, if *Rogers* had in fact rejected common-law proximate causation, as McBride maintains, it is highly unlikely that the Court would have quoted an instruction on that very element without in some way *disapproving* it. It is all the more unlikely because, as McBride points out, the Court *did* "fault[] the trial court" for failing to instruct on a related issue. RB43n.23.

Second, the plaintiff-petitioner in *Rogers* did not ask this Court to abandon proximate cause, but contended that the evidence permitted a jury finding that the railroad's negligence was a proximate cause

of his injury. PB40. McBride argues that Rogers' brief advocated a "broadened" concept of proximate cause. RB44. But the "broadened" concept to which Rogers referred was a rejection of *sole* proximate causation, not of proximate causation generally. As Rogers' brief put it, "[t]he words 'in part' *** suggest that there may be a plurality of causes," and thus FELA "makes the employer liable for his negligence, even though some other factor may logically be said to be more influential in producing the injury." Brief for Petitioner at 25, 27, *Rogers* v. *Mo. Pac. R.R.*, 352 U.S. 500 (1957) (No. 28), 1956 WL 89025, at *25, *27 (internal quotation marks omitted).

Third, three of "the prior cases on which *Rogers* relied *** unambiguously recognized proximate cause as the standard applicable in FELA suits." *Sorrell*, 549 U.S. at 175-176 (three-Justice concurrence). McBride argues that one of those cases—*Coray*—"rejected incorporation of common-law proximate-cause requirements into FELA." RB25. As we have already explained, however, McBride's understanding of *Coray* is mistaken. McBride argues that the other two cases—*Carter* and *Tiller*—"were cited for holdings unrelated to causation." RB45. But that is incorrect. The Court cited *Carter* for the proposition that, when a railroad is shown to have violated certain safety statutes, "[t]he only issue then remaining is causation," *Rogers*, 352 U.S. at 507 n.13, and it cited *Tiller* for the proposition that the question in FELA cases is "whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit," *id.* at 508.

Fourth, the dissenting Justices in *Rogers* did not understand the Court to have established any new

principle of causation, but contended that the Court had improperly substituted its view of the evidence for that of the lower court. PB41-42. McBride argues that Justice Harlan's dissent took the position that the Court had "'departed from' 'common-law rules.'" RB45-46. But the "rules" to which Justice Harlan referred concerned sufficiency-of-the-evidence review, not the standard of causation. See *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 564 (1957) (opinion of Harlan, J.) ("jury verdicts *** [must] be arrived at by reason and not by will or sheer speculation"). McBride also argues that Justice Frankfurter's dissent recognized that FELA rejects common-law proximate causation. RB46. In fact, what Justice Frankfurter said is that, by using the language "in whole or in part," FELA "avoid[s] issues about '*sole* proximate cause.'" *Ferguson*, 352 U.S. at 538 n.7 (Frankfurter, J., dissenting) (emphasis added). That supports our position, not McBride's.[4]

3. Post-*Rogers* decisions

McBride contends that this Court has "reaffirmed" post-*Rogers* that a FELA plaintiff "need not demonstrate common-law proximate causation." RB32. But the cases on which he relies, RB32-35, are consistent with the decisions applying proximate cause.

Most of the cases McBride cites did not involve causation at all. Contrary to the argument of some

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[4] Contrary to McBride's suggestion, RB46, the Association of American Railroads' *amicus* brief supporting rehearing in *Rogers* made the same point. See Brief of the Association of American Railroads at 11, *Rogers* v. *Mo. Pac. R.R.*, 352 U.S. 500 (1957) (No. 28), 1957 WL 86996, at *11.

of his *amici* that the issue of causation "was squarely before the Court" in *Ferguson*, Campagno Br. 12, that case held only that "there was sufficient evidence to take to the jury the question whether respondent was negligent," 352 U.S. at 522 (opinion of Douglas, J.). As for *Kernan* v. *American Dredging Co.*, 355 U.S. 426 (1958), that case did not reject any "definition of proximate cause," as one of his *amici* claims, AAJ Br. 26, but merely held that, under the doctrine of negligence *per se*, the plaintiff's injury need not be one that "the [safety] statute sought to prevent," 355 U.S. at 433; *Kernan* in fact quoted the statement in *Davis* v. *Wolfe* that FELA authorizes recovery if a violation of the Safety Appliance Act "is a proximate cause of the accident," *id.* at 434 (quoting 263 U.S. at 243). As for the other cases: *Crane* v. *Cedar Rapids & Iowa City Railway*, 395 U.S. 164 (1969), held that a State can make the defense of contributory negligence available to a railroad sued by a non-employee under the common law. *Atchison, Topeka & Santa Fe Railway* v. *Buell*, 480 U.S. 557 (1987), held that the possibility of filing a labor grievance under the Railway Labor Act does not deprive an employee of the right to bring a FELA action. *Gottshall* concerned negligent infliction of emotional distress. And *Ayers* addressed whether FELA permits recovery for fear of cancer and authorizes joint and several liability.[5]

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[5] *Ferguson* and *Kernan* are Jones Act cases, to which FELA principles apply. McBride and some of his *amici* cite briefs filed in the Fifth, Ninth, and Eleventh Circuits in which the United States acknowledged that Jones Act causation is "relaxed." RB33n.20; Campagno Br. 20-22. But those briefs prove nothing, because, at the time the cases were litigated, that was the long-settled law in the Fifth and Ninth Circuits. Pet.23n.5, and

The two other cases cited by McBride did involve causation, but they held only that there was sufficient evidence that the railroad's negligence was a cause of the employee's injury. *See Gallick* v. *Baltimore & Ohio R.R.*, 372 U.S. 108, 113–117 (1963); *Dennis* v. *Denver & Rio Grande W. R.R.*, 375 U.S. 208, 210 (1963) (per curiam). Neither decision called into question the requirement that the cause be a proximate one. Indeed, in both cases—as in *Rogers*—the jury was instructed that it must be. *See Gallick*, 372 U.S. at 111; *Dennis*, 375 U.S. at 211 n.* (Douglas, J., dissenting). McBride's assertion that *Gallick* "rejected *** common-law proximate-cause standards," RB33-34, is both unsupported and incorrect.

In discussing *Crane* and *Gottshall*, McBride highlights their dicta on causation. RB34 & n.21. But the dicta are consistent with the proper understanding of *Rogers*—*i.e.*, that FELA rejects any requirement of *sole* proximate causation. PB43-44. In any event, earlier holdings control over later dicta. PB44.

In this connection, it is curious, to say the least, that McBride concludes his brief with several pages on the virtues of statutory *stare decisis*. RB51-55. Even the court of appeals recognized that this Court's "[e]arly FELA cases did not interpret the language 'resulting in whole or in part' as altering the common-law requirement of proximate cause" and that these cases "never have been overruled explicitly" by any decision, including *Rogers*. Pet.App.9a, 12a, 18a. Despite McBride's claims to the contrary, moreover, RB51-52, the lower courts

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the Eleventh Circuit was bound by the relevant Fifth Circuit decisions.

have been divided, since *Rogers*, on whether FELA requires proximate causation. Pet.22-27 & nn.5-8; PB45-47 & n.9. That is presumably one of the reasons why the Court granted certiorari in this case. If anything is to be inferred from Congress's failure to "express its disapproval" of the decisions in this area, RB55, therefore, it is that Congress does not disapprove of this Court's only square holdings on point.

In addition to having held repeatedly that FELA requires proximate causation, this Court has held that the antitrust, RICO, and securities statutes embody the same requirement. PB47-48. McBride does not deny this. Instead, he seeks to draw artificial distinctions between the other statutes and FELA. RB49-50. But he cannot overcome the relevant characteristic that they share—namely, that the Congress that enacted each statute intended that it would encompass basic common-law principles, of which proximate causation is self-evidently one. PB47-48.

C. Neither FELA's Legislative History Nor Its Remedial Purpose Supports McBride's Position

1. According to McBride, the legislative history "reveals no evidence that Congress *** meant to incorporate the *** 'proximate cause' limitations *** imposed in [common-law] negligence cases." RB20. In fact, the legislative history reveals precisely that. Quoting the House Report, McBride says that "Congress's core purpose in FELA was 'to *change* the common-law liability of employers ... for personal injuries received by employees.'" *Ibid.* (quoting H.R. Rep. No. 60-1386, at 1 (1908)). What he fails to mention is that, immediately after the quoted sentence, the House Report listed the ways in which the bill

changed the common law. Altering the requirement of proximate causation was not one of them. Instead, consistent with the statutory text, both the House and Senate Reports explained that FELA revised the common law in four "particulars": by abolishing the fellow-servant rule, contributory negligence, and assumption of risk, and prohibiting exemption from the Act through contract. PB51-52. That is compelling evidence that Congress did not intend to abrogate other common-law doctrines.

McBride also argues that the 75th Congress's rejection, in 1939, of an amendment that would have employed the term "proximately contributed" in Section 4 of FELA shows that the 60th Congress did not intend proximate cause to be the standard when it enacted Section 1 of FELA in 1908. RB21. The short answer to this argument is that "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz* v. *Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011). The slightly longer answer is that "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation," because "several equally tenable inferences may be drawn from [them], including the inference that the existing legislation already incorporated the offered change." *United States* v. *Craft*, 535 U.S. 274, 287 (2002) (internal quotation marks omitted). That inference is warranted here. Because this Court had consistently interpreted FELA to require proximate cause, PB27-30 & nn.6-7, the most likely explanation for Congress's decision not to use proximate-cause language in the final bill is that it was unnecessary. Indeed, a union representative testified that the language would be "pure surplusage, because unless the negligence

proximately caused the injury there can be no recovery." *Hearings on H.R. 4988 and H.R. 4989 Before the H. Comm. on the Judiciary*, 76th Cong. 5 (1939) (statement of general counsel of Brotherhood of Railroad Trainmen).

2. McBride devotes nearly three pages of his brief to the argument that requiring proximate causation would be inconsistent with FELA's remedial purpose. RB36-38. He nowhere acknowledges, however, that this Court rejected that very theory in *Sorrell*—a point we made in our opening brief, PB49.

In the same section of his brief, McBride argues that it is unnecessary to require proximate causation because Congress achieved the "purposes of the common-law 'proximate cause' doctrine through other statutory means"—namely, by "restrict[ing] the statutory cause of action to rail workers or their families." RB37. There is thus "no danger," according to McBride, that "railroads will be exposed to suit by an open-ended class of unknown plaintiffs." *Ibid.*

Restricting the class of plaintiffs, however, does not obviate the need for a proximate-cause limitation on suits that can be brought under FELA. Section 10(b) of the Securities Exchange Act of 1934, for example, restricts the cause of action to purchasers and sellers, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), yet this Court has held that purchasers and sellers must prove proximate causation, PB48. Without that firmly established limitation, and contrary to McBride's assertion, there self-evidently *is* a danger that defendants in FELA cases, like those in securities, antitrust, and RICO cases, "will be held liable for 'remote consequences'" of their

wrongdoing. RB37. That is why the common law imposes the limitation. PB21-23.[6]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[6] One of McBride's *amici* (though not McBride) makes the alternative argument that, even if FELA requires proximate causation, juries should not be instructed on that element. AAJ Br. 30-35. But trial courts have an obligation "to instruct the jury on the proper legal standard" in FELA cases. *CSX Transp., Inc.* v. *Hensley*, 129 S. Ct. 2139, 2141 (2009) (per curiam). Indeed, *amicus*'s argument is fundamentally at odds with *Sorrell*. That case holds that courts must "instruct a jury to apply the same causation standard to railroad negligence and employee contributory negligence." 549 U.S. at 172. If the Court holds in this case that the standard is proximate causation, then juries must be instructed on it.

AMICUS CURIAE BRIEF

No. 10-235

In the Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Petitioner,

v.

ROBERT McBRIDE,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF THE ACADEMY OF RAIL LABOR ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Question Presented

What is the standard of causation in FELA cases?

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BRIEF OF THE ACADEMY OF RAIL LABOR ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE[1]

The Academy of Rail Labor Attorneys ("ARLA") is a national organization of trial lawyers specializing in FELA litigation. Members represent both union and non-union railroad workers who have been injured, as well as their families. ARLA also provides continuing legal education for practitioners and training for other interested parties. Importantly, ARLA members play a key role in federal and state courts throughout the country. Members use their vast experience to help the judiciary navigate the sometimes-complex contours of FELA law. For example, ARLA members regularly work hand-in-hand with judges to craft jury instructions in hopes of accurately conveying FELA law without confusing jurors. That experience makes ARLA members particularly suited to comment on Petitioner's recommendation that the Court adopt an unworkable standard for causation under FELA. ARLA is convinced that the Court must reaffirm its decisions on FELA causation and reject CSX attempts to inject a legalistic term into FELA's uniform framework.

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[1] No person or entity other than the Academy of Rail Labor Attorneys ("ARLA") has made a monetary contribution toward this Brief and no counsel for any party authored this Brief in whole or in part. A letter of universal consent has been filed by the Respondent granting consent to file *amicus curiae* briefs, and a letter of consent from Petitioner has been filed.

STATEMENT OF THE CASE

ARLA adopts the Statement of the Respondent.

SUMMARY OF THE ARGUMENT

Petitioner CSX asks this Court to usher an era of uncertainty into the nation's courts by placing its desire for a legalistic, undefined label over long-settled law. The standard for causation in FELA cases has been set and relied upon for more than a century. That standard was drafted by Congress and remains part of FELA's plain language. This Court has articulated that standard as whether "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." This standard remains the same regardless of the label attached to it. Put simply, the causation standard for FELA was long ago determined by statute and has been consistently interpreted by the decisions of this Court many times since.

CSX asks this Court to declare common-law proximate cause the standard under FELA, without offering any definition as to what the term means. Proximate cause can be used generically to indicate some limitation on responsibility or it can be used to specifically mean common-law proximate cause. CSX would have this Court purge all of its decisions recognizing a relaxed standard of causation, and revert back to a pre-FELA common-law proximate cause standard—something not intended by Congress

or cognizable in this Court's decisions. The danger confronting FELA parties and practitioners is not in labeling the standard. Rather, the peril lies in the confusion that will engross judges, attorneys, railroads, jurors, and injured workers should the Court declare proximate cause the standard without defining what the term means in the FELA context.

The parties offer facially conflicting interpretations of this Court's previous decisions regarding FELA causation. CSX highlights cases in which this Court used the term proximate cause. McBride proffers cases in which this Court clearly states that a relaxed standard of causation applies in FELA cases. This Court's decisions, however, do not conflict. CSX mistakenly assumes that this Court was referring to common-law proximate cause and not to the term in a generic sense indicating some limitation on responsibility. But this Court's pre-*Rogers* decisions using the term "proximate cause" explicitly recognized a relaxed standard of causation.

There is a substantial body of cases issued by this Court stating, both expressly and inferably, that a relaxed standard of causation applies to FELA. Perhaps it is more appropriate to say a relaxed standard of proximate causation applies to FELA. But CSX is not asking this Court to recognize a mere generic use of the term or even to define what causation in the FELA context means. Rather, CSX asks this Court to uproot FELA's long-settled causation standard and replace it with an undefined

legal term; presumably so that the railroad industry can mold it into the standard it actually wants.

This Court may ultimately recognize both a relaxed standard and the label of proximate cause. Defining the standard as it has in the past, but labeling it as proximate cause (in the generic sense) enables the Court to interpret its facially conflicted cases in a non-conflicting manner. Doing so maintains uniformity and ensures that the correct standard of causation—which this Court has ruled on time and again—is applied across the nation's courts.

ARGUMENT

I. This Court has developed a body of FELA jurisprudence recognizing a relaxed standard of causation, this standard remains the same regardless of the label attached to it.

This Court has built a body of precedent specific to FELA, as "it is up to the Court to develop and administer a fair and workable rule of decision." *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 176 (2002) (Kennedy, J., concurring). This relaxed standard courses through the veins of FELA's plain language and this Court's body of jurisprudence. The standard is derived from this Court's interpretation of FELA's "in whole or in part" statutory language. *See Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994); *Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 164, 166 (1969) (injured rail worker was "not

required to prove common-law proximate causation, but only that his injury resulted in 'whole or in part' from the railroad's violation of the Act"); *Gallick v. Balt. & Ohio R.R. Co.*, 372 U.S. 108, 120-21 (1963); *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 506 (1957). This Court has also referred to the term proximate cause in FELA decisions, albeit almost entirely in pre-*Rogers* decisions and without any analysis. All references by this Court to proximate cause as part of FELA have come in passing reference without fully exploring the legitimacy of the term "proximate cause" in FELA. Because those decisions also recognize a relaxed standard, logic implies that this Court's pre-*Rogers* decisions used the term in the generic sense to indicate a limitation applied, not in recognition of a common-law standard. But regardless of whether FELA causation is labeled "proximate cause," "legal cause," or "cause," the standard remains the same: whether "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

A. This Court has repeatedly interpreted FELA as having a relaxed standard of causation.

FELA has incorporated a relaxed standard of causation since its inception. Many courts, commentators, and practitioners point to *Rogers* as the impetus for FELA's departure from common-law proximate cause. Complete reliance on *Rogers* for this proposition, however, is not needed. Instead,

drawing on this Court's earlier decisions, *Rogers* either simply restated the causation standard for FELA or defined a generic proximate cause standard as it applies to only FELA.

Looking at (1) this Court's pre-*Rogers* decisions and (2) this Court's post-*Rogers* decisions reveals that this Court has routinely recognized a relaxed causation standard under FELA.

1. This Court recognized a relaxed standard of causation under FELA before deciding Rogers.

This Court's recognition of a relaxed standard comes in the form of statutory interpretation. Principles of *stare decisis* are given their most profound deference when statutory interpretation is involved. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). Accordingly, this Court should follow the FELA relaxed causation standard which it has molded out of FELA's plain language.

Before *Rogers*, this Court interpreted FELA as requiring a relaxed causation standard. In *Coray v. Southern Pacific Co.*, the Court criticized the Utah Supreme Court for distinguishing between "'proximate cause' in the legal sense, deemed sufficient to impose liability, and 'cause' in the 'philosophical sense' deemed insufficient to impose liability." 335 U.S. 520, 523 (1949). The Court provided:

> The language Congress selected to fix liability in FELA is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretive purpose. [FELA] declares that railroads shall be responsible for their employees' deaths 'resulting in whole or in part' from defective appliances such as were here maintained.

Id. at 524.

Coray was not a novel decision. Ten years after FELA was enacted, this Court reviewed a jury instruction asking if a defect had contributed "in whole or in part" to a rail worker's injury. *Union Pac. R.R. Co. v. Huxoll*, 245 U.S. 535, 537 (1918). The Court held that the trial court charged the issue to the jury correctly. *Id.* at 538. A few months later, the Court decided *Union Pacific Railroad Co. v. Hadley*, 246 U.S. 330 (1918). In *Hadley*, the Court held that although the plaintiff's contributory negligence was deemed the last and most significant cause, "it would be emptying [FELA] of its meaning" to say that the plaintiff's harm "did not result in part" from the negligence of the railroad. *Id.* at 333. *Bailey v. Central Vermont Railway* also addressed the standard of causation for FELA claims. 319 U.S. 350 (1943).

Bailey, unskilled and unfamiliar with "hopper cars," died while opening a hopper car. *Id.* at 351-52. While opening the car, the wrench he was using spun and threw him into the road. *Id.* *Bailey* explicitly

stated, "Sec. 1 of the Act makes a carrier liable in damages for any injury or death 'resulting in whole or in part from the negligence' of any of its 'officers, agents, or employees.'" *Id.* at 353. Applying the written standards supplied by Congress, this Court concluded that the jury had sufficient evidence to find the defendant liable to Bailey. *Id.* at 354.

This Court further affirmed the relaxed causation standard of FELA claims shortly after *Coray* in *Carter v. Atlanta & St. Andrews Bay Railway Co.*, 338 U.S. 430 (1949). In *Carter*, this Court reversed a Fifth Circuit Court of Appeals case upholding a directed verdict for the defendant because the cause "was the remote, not proximate, cause of the plaintiff's injuries." *Id.* at 433. "Congress has directed liability if the injury resulted 'in whole or in part' from defendant's negligence or its violation of the Safety Appliance Act." *Id.*

Lower courts have also followed the guidance of the Supreme Court regarding a more relaxed causation standard before *Rogers*. In *Hodgman v. Sandy River & Rangeley Lake Railroad* the Maine Supreme Court stated that upon showing a defect under the Safety Appliance Act, the plaintiff needed to show that the defect "contributed in whole or in part" to produce the harm. 107 A. 30, 31 (1919). South Carolina's Supreme Court concluded that liability attaches under the Safety Appliance Act when a defect contributes "in whole or in part" to the plaintiff's harm. *Barton v. S. Ry. Co.* 171 S.E. 5, 6-7

(S.C. 1933). The *Barton* court recognized that the doctrine was "firmly established by decisions of the Supreme Court of the United States." *Id.* at 7. The Third Circuit Court of Appeals concluded that a defendant is liable under FELA for harm to a plaintiff "if it resulted 'in whole or in part' from the defendant's negligence." *Bartkoski v. Pittsburgh & Lake Erie R. Co.*, 172 F.2d 1007, 1009 (3d Cir. 1949). These cases demonstrate that the causation standard before *Rogers* had already been relaxed to reflect FELA's plain language.

In fact, so common was this view that in 1956, a year before *Rogers*, two prominent legal publications recognized that the most important deviation FELA made from the common law was implementing a relaxed standard of causation. Professor Leon Green, a nationally recognized tort scholar, wrote for the Yale Law Journal, and another article appeared in the Harvard Law Review.[2] An overview of these respective articles offers insight into the state of FELA causation before *Rogers*:

Yale Law Journal:

- The "proximate cause" issue in [cases] under the statute is restricted to causal relation "in whole or in part."

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[2] This article was relied upon in *Rogers* for the proposition that lower courts' failure to recognize FELA's departure from the common law has required this Court to review a large number of cases to correct the problem. *See Rogers*, 353 U.S. at 509-10, n.24.

- The endless and useless confusion developed by many of the common law courts about the term "proximate cause" is sedulously avoided.

Leon Green, *Jury Trial and Mr. Black*, 65 Yale L.J. 482, 489-90 (1956).

Harvard Law Review:

- The Court has relaxed the requirements for submission of a case to the jury with respect to the kind of conduct which violates the railroad's duty of care to the employee and to which the employee's injury may be attributed.

- Traditionally . . . a verdict may be directed if the judge believes a reasonable jury could not find proximate cause. However, recent FELA decisions indicate that the jury must now be given wider latitude.

- The Court has justified its position by reference to the liberal policy toward the worker which underlies FELA.

Note, *Supreme Court Certiorari Policy in Cases Arising Under the FELA*, 69 Harv. L. Rev. 1441, 1148-50 (1956).

CSX obscures this pre-*Rogers* framework by plucking portions out of Justice Souter's concurrence in *Sorrell* to support the proposition that *Rogers* did not remove proximate cause from FELA. But this Court's pre-*Rogers* cases had already interpreted

FELA as having a relaxed standard of causation. *Rogers*, if anything, merely illuminated this Court's earlier decisions. Because the focus in *Sorrell* was not on FELA causation, the parties devoted little or no attention to this Court's pre-*Rogers* string of cases. Without the issue before it and without the advantage of the parties briefing the subject, the Court in *Sorrell* saw little need to reexamine its pre-*Rogers* cases. Justice Souter's comment that "*Rogers* is an authority for nothing less than that proximate cause applies to FELA cases," does not conflict with these earlier decisions. Rather it merely confirms that if a concept such as proximate cause belongs in FELA, it must be defined within the confines of FELA's plain language and this Court's FELA jurisprudence.

*2. A relaxed standard has been continuously recognized in this Court's post-*Rogers *decisions.*[3]

This Court never renounced a relaxed standard after *Rogers*. In fact, quite the opposite occurred. For example, in *Crane v. Cedar Rapids & Iowa City Railway Co.*, this Court explicitly said injured workers are "not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's" negligence." 395 U.S. at 166. Many other cases, e.g. *Gottshall*, *Ayers*, and *Gallick*, restate the same principle.

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[3] Because the parties extensively briefed this Court's post-*Rogers* decisions, they are not reanalyzed here.

No justification exists for this Court to overturn its substantial jurisprudence defining FELA's causation standard. Justice Souter's concurrence even went to lengths to limit the discussion to only *Rogers*. *Sorrell*, 549 U.S. at 177 (Souter, J., concurring). This Court's pre-*Rogers* decisions were sparsely briefed in *Sorrell* and, unsurprisingly, received only a glance in Justice Souter's concurrence. Limited discussion of one case within one concurrence does not provide justification for overturning a century's worth of jurisprudence.

3. *FELA's relaxed standard of causation does not equate to an unrestrained "but for" causation test.*

FELA employs a relaxed standard of causation; it does not dispense with need to prove causation. CSX and the railroad industry argue that FELA constitutes an unrestrained framework for injured rail workers, resembling a workers' compensation scheme. But a relaxed standard is still a standard, and FELA resembles nothing of a "no-fault system" as the railroad industry claims. For example, in *Inman v. Baltimore & Ohio Railroad Co.*, this Court recognized FELA's relaxed standard, but upheld a reversal based on the lack of a sufficient causal relationship. 361 U.S. 138, 139-40 (1959). *Inman* recognized some slight evidence of causation, but concluded that it was "so thin that, on judicial appraisal, the conclusion must be drawn that negligence on the part of the railroad could have

played no part in petitioner's injury." *Id.* at 140. The Ninth Circuit, after recognizing that FELA causation is "less than it is in a common law tort action," concluded that plaintiff still needed to prove a causal relationship between the railroad's negligence and his injuries. *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 503 (9th Cir. 1994). But the court noted, "this does not mean, however, that FELA plaintiffs need make no showing of causation . . . FELA plaintiffs still must demonstrate some causal connection between a defendant's negligence and their injuries." *Id.* Another example is *Higgins v. Metro-North Railroad Co.*, 318 F.3d 422, 426 (2d Cir. 2003), where the trial court granted summary judgment in Metro-North's favor because an employee's actions were too remote to apply under FELA's relaxed standard. While these cases resulted in a finding of no causation because the plaintiffs' claims were too remote, they also restated that a relaxed standard applies in FELA. More importantly, they show that that FELA's relaxed standard cuts off claims which are too remote. Decisions like these show that FELA has not morphed into a quasi-workers' compensation scheme.

B. This Court's decisions recognizing a relaxed causation standard do not conflict with pre-*Rogers* decisions using the phrase "proximate cause."

At first glance, it appears the parties' arguments are inherently conflicted. McBride argues for a

relaxed standard. CSX argues that proximate cause is the standard. CSX then takes the position that if proximate cause is the standard then McBride's proffered jury instruction was erroneous. This simply is not the case.

If at all possible, this Court's decisions must be reconciled, even if facially conflicted. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 99-100 (1990) (White, J., concurring) ("the doctrine of *stare decisis* demands that we attempt to reconcile our prior decisions rather than hastily overrule some of them"). Here the parties' positions are logically reconcilable.

Courts use the term "proximate cause" to "label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). This generic label of proximate cause does not conflict with FELA's relaxed standard of causation. Rather, it is correctly read that any references in this Court's pre-*Rogers* decisions to the term were to the generic concept of proximate cause. Any reference to proximate cause, even in this generic sense, must be limited to how it has been *specifically defined in this Court's FELA decisions only*.

For CSX's argument that McBride's instruction was erroneous to hold true, proximate cause in the FELA-specific context must not be a relaxed standard. Even if this Court were to follow Justice

Souter's concurrence from *Sorrell*—that *Rogers* did not eliminate proximate cause—the Court must not ignore its holdings both pre- and post-*Rogers*. Instead, the Court should look to its decisions, e.g., *Crane*, *Gallick*, and *Gottshall*, to determine whether a relaxed standard applies.

But these decisions need not have excised the generic concept of proximate cause from FELA for a relaxed to standard to apply. "It would be more accurate . . . to recognize that *Rogers* describes the test for proximate causation applicable in FELA suits. That test is whether 'employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" *Sorrell*, 549 U.S. at 812-13 (Ginsburg, J., concurring). The statements of this Court are easily reconciled by viewing its holdings as recognizing a generic concept of proximate cause, merely that there is some limitation for recovery based on remoteness.

At this point, nothing is gained by labeling FELA standard of causation "proximate cause," even in the generic sense. Doing so only invites misuse of the term which defies FELA's long-settled causation standard. Contrary to CSX's position, the FELA causation standard is what matters, not the label attached to it.

C. The Seventh Circuit, through its model jury instructions, already has a system reconciling the term "proximate cause" with FELA's relaxed standard; this Court should follow the Seventh Circuit's lead.

The Court need only look to the Seventh Circuit, from whence this case came, to see that the label proximate cause is area-of-law specific and can easily be reconciled with this Court's FELA jurisprudence.

To begin, the Seventh Circuit refuses to provide a model instruction for proximate cause. The Committee Comments specify several reasons for this:

- The Committee included no general instruction regarding "proximate cause" because these terms are not uniformly defined. 7th Cir. Pattern Civil Jury Instr. § 1.30 cmt. a. (2009 rev.) (reprinting 2008 revision of Instruction No. 9.02).

- There is no consistent causation standard for either federal or state claims. *Id.*

- The state law standards on causation vary widely and are subject to change. *Id.*

- Therefore, a court must use only the correct definition for the issues before it. *Id.*

The Seventh Circuit, consistent with its recognition that causation standards must be specific to the

issues before it, offers a FELA-specific causation instruction. The trial court correctly used this FELA-specific causation instruction. That instruction reads:

> Defendant "caused or contributed" to Plaintiff's injury if Defendant's negligence played a part—no matter how small—in bringing about the injury. The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence. 7th Cir. Pattern Civil Jury Instr. § 9.02 (2009).

Again, instructing the jury on the proper standard is what is important; not labeling that standard. The Seventh Circuit has expressly defined FELA's causation standard and implemented that definition into its jury instructions.

Several states have followed a similar approach. The Iowa Supreme Court noted that the standard is whether the railroad's "negligence proximately caused, in whole or in part, the accident . . . or more precisely enough to justify a jury's determination that employer negligence had played *any* role in producing the harm." *Snipes v. Chi., Cent. Pac. R.R. Co.*, 484 N.W.2d 162, 165 (Iowa 1992). The Kentucky Supreme Court has expressed its concern regarding the term proximate cause in its jury instructions, noting that only the standard—not a label—should be given to jurors. *CSX Transp., Inc. v. Begley*, 313 S.W.3d 52, 63-64 (Ky. 2010).

The Seventh Circuit's direction provides this Court with a clear, logical pathway for reconciling the common-law term proximate cause with FELA's relaxed standard of causation. Put simply, FELA's causation standard is a more relaxed standard than common-law proximate cause. This relaxed standard is specific to FELA, and this Court need not make any comment or judgment on its interpretation of proximate cause in other contexts.

Further, even if the FELA causation standard were properly labeled "proximate cause" in the generic sense, the jury below was instructed correctly because the Seventh Circuit correctly tracked FELA's plain language and this Court's articulation of that plain language. Because the jury was instructed on the correct causation standard, not labeling it "proximate cause" was not reversible error. *See Boyd v. Ill. State Police*, 384 F.3d 888, 894 (7th Cir. 2004) (we review jury instructions only to determine if taken as a whole they correctly informed the jury of the applicable law).

II. CSX asks this Court to supplant a stable, uniform standard and replace it with turmoil by attaching an undefined label to FELA causation.

One of the core objectives of Congress in enacting FELA was to secure a uniform framework for protecting injured rail workers. *Chi. Milwaukee & St. Paul Ry. Co. v. Coogan*, 271 U.S. 472, 474 (1926).

This objective has been readily accomplished. In the statutory context, *stare decisis* is vital where this Court's decisions have been acted upon to create a uniform standard and changing that standard would dislodge settled rights and expectations. *Hilton v. S.C. Pub. Ry. Comm'n*, 502 U.S. 197, 202 (1991). Introducing a tortured concept such as proximate cause without defining it would do just that.

It cannot legitimately be argued that proximate cause has engendered anything less than a plagued history or that courts have not struggled with defining the concept. Declaring proximate cause the standard without first defining it will have a disparate, harsh impact on injured rail workers. This is exactly the result Congress sought to avoid by establishing FELA.

The following exemplify the uniformity FELA currently enjoys: (a) the model jury instructions crafted by the federal appellate circuits and individual states; (b) the apposite cases from each federal appellate circuit; and (c) the apposite cases from the majority of states.

A. The pattern jury instructions of all Federal Circuits and States recognize a relaxed standard of causation.

Currently, five Federal Circuits have constructed model or pattern FELA jury instructions. All five of these instruction sets recognize a relaxed standard of causation:

- Fifth Circuit Court of Appeals: "Negligence is a legal cause of damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage." 5th Circuit Pattern Jury Instr. – Civil 5.1 (2009).

- Seventh Circuit Court of Appeals: "Defendant 'caused or contributed' to Plaintiff's injury if Defendant's negligence played a part—no matter how small—in bringing about the injury. The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence. 7th Cir. Pattern Civil Jury Instr. § 9.02 (2009).

- Eighth Circuit Court of Appeals: "Such negligence resulted in whole or in part in injury to the plaintiff." 8th Cir. Civil Jury Instr. § 7.01 (2008).

- Ninth Circuit Court of Appeals: "Negligence is a cause of an injury if it played any part, no matter how slight, in bringing about the injury or damage, even if the negligence operated in combination with the acts of another, or in combination with some other cause." 9th Cir. Civil Jury Instr. § 6.4 (2007).

- Eleventh Circuit Court of Appeals: "[N]egligence is a 'legal cause' of damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage." 11th Cir. Pattern Jury Instr. § 7.1 (2005).

Currently, seven States have model FELA instructions. All of these instructions recognize a relaxed standard of causation:

- Alabama: "[S]uch negligence must be the proximate cause, in whole or in part, of the injury . . . damages must be caused, in whole or in part, as a direct result of the negligence complained of." Ala. Pattern Jury Instr. Civil 2d. 17.12 (2009).

- California: "[A]n act of omission that plays any part, no matter how small, in actually bringing about the injury, is a cause of that injury." Cal. Civil Jury Instr. 11.14 (2010).

- Illinois: "[W]henever an employee of a railroad is injured . . . the railroad shall be liable in damages where the injury results in whole or in part from the negligence [of the railroad]." Ill. Pattern Instr. – Civil 160.01 (2009)

- Kansas: The railroad "shall be liable for damages whenever . . . injury results in whole or in part from the negligence [of the railroad]." Pattern Instr. Kan. – Civil 132.01 (2008).

- Missouri: "[S]uch negligence resulted in whole or in part in injury of [the plaintiff]." Mo. Approved Jury Instr. 24.01 (2011).

- Montana: "For purposes of this case, an act or failure to act is the cause of an injury if it plays

a part, no matter how small, in bringing about the injury. Mont. Pattern Instr. Civil 6.05 (2003).

- New York: "[T]hat the negligence play some part, however slight, in causing the incident in which [plaintiff was injured]." N.Y. Pattern Jury Instr. 2:180 (2011).

B. Seminal cases in all Federal Circuits have held that a relaxed standard of causation applies to FELA.

Every Federal Appellate Court that hears FELA cases has had the opportunity to decide the causation standard in FELA cases. Taking its cue from this Court, every circuit recognizes that a relaxed standard belongs in FELA:

- *Moody v. Bos. and Me. Corp.*, 921 F.2d 1, 4 (1st Cir. 1990): "The test for . . . causation is 'whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury."

- *Ulfick v. Metro-N. Commuter R.R.*, 77 F.3d 54, 58 (2d Cir. 1996): The test is whether "employer negligence played any part, even the slightest, in producing the injury . . . Thus, an employer may be held liable under FELA for risks that would otherwise be too remote to support liability at common law."

- *Pehowic v. Erie Lackawanna R.R. Co.*, 430 F.2d 697, 699 (3d Cir. 1970): Citing *Rogers*, the court stated that an employer is liable if the injury was caused in whole or in part by its negligence.

- *Aldridge v. Balt. & Ohio R.R. Co.*, 789 F.2d 1061, 1065 (4th Cir. 1986): The court was unable to find error in the trial court not ruling that, as a matter of law, the railroad's negligence did not "play [] *any* role in producing the harm."

- *Comeaux v. T.L. James & Co.*, 702 F.2d 1023, 1024 (5th Cir. 1983) (*per curiam*): FELA's relaxed standard "incorporates any cause regardless of immediacy."

- *Szekeres v. CSX Transp., Inc.*, 617 F.3d 424, 430 (6th Cir. 2010): "On the question of causation, courts 'focus on whether a reasonable jury could conclude that the defective appliance played *any* part, even the slightest, in bringing about the plaintiff's injury.'"

- *Coffey v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 479 F.3d 472 (7th Cir. 2007): Court affirmed that relaxed standard applies to causation but not negligence.

- *Wright v. Ark. & Mo. R.R. Co.*, 574 F.3d 612 (8th Cir. 2009): Court held that relaxed

causation jury instructions did not abuse trial court's discretion since the same standard of causation applied to plaintiff and defendant.

- *Armstrong v. Burlington N. R.R. Co.*, 139 F.3d 1277, 1279 (9th Cir. 1998): Under FELA, liability may be imposed on an employer where their negligence played any part, even the slightest, in producing the injury.

- *Standard v. Union Pac. R.R. Co.*, 34 Fed. App'x 629, 632 (10th Cir. 2002): The court stated that negligence and causation is established in a FELA if the defendant's acts played any part "even the slightest" in producing the injury.

- *Nichols v. Barwick*, 792 F.2d 1520 (11th Cir. 1986): The burden on the plaintiff for "proximate cause" under the Jones Act is very light.

- *Nat'l R.R. Passenger Corp. v. McDavitt*, 804 A.2d 275, 283 (D.C. 2002): "FELA allows a railroad employee to recover damages for work-related injuries 'resulting in whole or in part' from the negligence of the railroads's agents or from 'any defect or insufficiency' in the railroad's equipment due to its negligence."

C. The majority of State supreme courts have held that a relaxed standard of causation applies to FELA and those States with pattern FELA instructions all recognize a relaxed standard of causation.

The vast majority of the highest courts in each State recognize relaxed FELA causation. Even after *Sorrell*, all but one State supreme court has found that a relaxed standard applies to FELA:

- *Cheff v. BNSF Ry. Co.*, 243 P.3d 1115, 1122 (Mont. 2010): "An employee is entitled to recover damages under FELA as long as his or her employer's negligence played any role in producing his or her injuries."

- *CSX Transp., Inc. v. Miller*, 46 So. 3d 434, 461 (Ala. 2010): "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

- *Kennedy v. Ill. Cent. R.R. Co.*, 30 So. 3d 333, 336 (Miss. 2010): "FELA supplants an employer's common law duty with a far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence."

- *Devinney v. Union Pac. R.R. Co.*, 786 N.W.2d 902, 906 (Neb. 2010): "Under FELA, railroad companies are liable in damages to any

employee who suffers injury during the course of employment when such injury results in whole or in part due to the railroad's negligence."

- *CSX Transp., Inc. v. Begley*, 313 S.W.3d 52, 63-64 (Ky. 2010): Upholding a jury instruction which advised "It is not enough to show that the Defendant's negligence, if any, was an indirect or remote cause of his injury." (internal quotation marks omitted).

- *Mills v. CSX Transp., Inc.*, 300 S.W.3d 627, 634 (Tenn. 2009): "[C]laimant [must] prove that the employer's negligence 'played any part, even the slightest, in producing the injury . . . for which damages are sought."

- *Montgomery v. CSX Transp., Inc.*, 656 S.E.2d 20 (S.C. 2008): Distinguishing between the standard for causation and negligence, court that FELA causation has a relaxed standard, but negligence does not.

- *Sorrell v. Norfolk S. Ry. Co.*, 249 S.W.3d 207 (Mo. 2008): On remand, Missouri's Supreme Court noted that they had approved new jury instructions due to this Court's ruling in *Sorrell*. The pattern instructions which were crafted after this Court's Sorrell decisions now instruct the jury that causation of both parties is to apply "in whole or in part."

- *Martin v. CSX Transp., Inc.*, 922 N.E.2d 1022 (Ohio Ct. App. 2009): The court refused to change from a relaxed causation standard to

proximate cause unless this Court expressly overrules relaxed causation under FELA.

- *Wilson v. BNSF Ry. Co.*, 215 P.3d 648 (Kan. App. 2009): Holding for relaxed causation.

These cases are merely the tip of the iceberg. Recorded and unrecorded decisions at the trial level relying on a relaxed standard are too numerous to review here. Indeed, this is where the impact of an undefined causation standard would be felt the most. Every case faces this issue. An undefined proximate cause standard would create countless controversies in trial courts and embroil appellate courts with waves of FELA cases. Ultimately, this Court might be forced to review the issue again if it is not thoroughly decided here.

III. Because this Court's decisions have evoked a uniform reliance on a relaxed standard of causation, declaring proximate cause the standard would result in turmoil.

The issue before this Court is one of pure "statutory construction, where the doctrine of *stare decisis* is most compelling." *Hilton*, 502 U.S. at 205. The doctrine has added force when people have acted in reliance on previous decisions. *Id.* at 202. Specifically, the issue presented to this Court is whether it should reexamine its longstanding statutory interpretation of FELA as requiring a relaxed standard of causation. Given the unreserved

reliance on this standard by courts, practitioners, railroads, and most importantly, injured workers, giving the utmost deference to the principles of *stare decisis* is warranted. This is particularly true given the consequences of accepting CSX's proposal.

CSX's proposition of declaring proximate cause the standard under FELA without defining is chilling. Proclaiming an undefined proximate cause as the FELA standard would have one of two dire consequences.

The first possible consequence is that State and Federal courts would be attempting to discern what proximate cause meant when FELA was enacted in 1908. This is a particularly daunting task considering courts have struggled fiercely with defining the slippery concept of proximate cause. This was particularly true before the New York Court of Appeals decided *Palsgraf v. Long Island Railroad* in 1928. 162 N.E. 99 (N.Y. 1928). It is impossible to imagine any scenario in which diverse courtrooms across the nation would interpret the 1908 common law uniformly. Additionally, were this possible, it would place a significant, unnecessary burden on the judges, practitioners, railroads, and injured rail workers who currently enjoy a uniform standard.

The second possible consequence is that every jurisdiction will interpret proximate cause based on its own definition. This will have the unintended consequences of both ignoring the common law at the

time FELA was enacted and ensuring a complete lack of uniformity across the nation. Ultimately, FELA cases will be tried based on each individual State's common law. This, of course, conflicts with the intent of the statute and disrupts the deference federal statutes are due over State common law. *Hilton*, 502 U.S. at 206.

Under both scenarios, juror confusion will be a problem. Jurors sifting through instructions will struggle with the term, just as judges and practitioners have. This warns strictly against using even the generic term of "proximate cause." "Noting the difficulty of defining proximate cause clearly in FELA cases . . . it would be better if no mention of proximate cause whatever was made to the jury. *Begley*, 313 S.W.3d at 63. Instead simply instructing the jury on the FELA causation standard is appropriate, that is: whether "employer negligence played any part, even the slightest, in producing the injury" complained of. *Id.*

CSX and the railroad industry essentially seek to enlist confusion as their ally in their assault on FELA by introducing an undefined term into an existing, stable framework. CSX even argues against applying its own proposed proximate cause instruction. The remedial nature of FELA will be ruthlessly undermined if railroads are allowed to cultivate favorable proximate cause instructions and introduce them within the framework of FELA. Like an exotic species invading a stable environment, introducing

harsh definitions into FELA could steadily replace the existing causal framework and significantly alter FELA's remedial nature and, in practice, abolish notions of pure comparative fault.

For example, in jurisdictions defining proximate cause as a "substantial" or "significant" cause, considerable danger threatens FELA's pure comparative fault requirements. The problem occurs in cases in which the plaintiff is appreciably, but not completely, at fault. For instance, in cases in which the plaintiff is 90% at fault, it is easy to imagine jurors confusing "significant" or "substantial" causation language as requiring non-recovery for the plaintiff.

The railroad industry goes a step further by meandering around any issue properly before this Court and instead blatantly begging for FELA to be replaced by a workers' compensation system. Apparently unsatisfied with its attempts at asking Congress to rewrite FELA, it is now asking this Court to do so. CSX and the railroad industry should not be allowed to utilize this case as a vehicle to fundamentally alter the governing principles of FELA. The reliance placed on this Court's previous decisions only heightens the peril.

CONCLUSION

CSX and the railroad industry ask this Court to introduce chaos into our courts. FELA practitioners, judges, railroads, and injured railroad workers rely on FELA's uniform relaxed causation standard. This Court shaped this standard by interpreting FELA's plain language, which Federal and state jury instructions now uniformly integrate. CSX would have this Court label the causation standard as "proximate cause" without defining the term. Proximate cause is a legal term of art which has confounded both bench and bar, and not least of all jurors. CSX and the railroad industry are attempting to use confusion as an instrument to declaw the FELA. Essentially, CSX asks this Court to do what Congress has repeatedly refused to do: rewrite FELA.

A relaxed standard was recognized before *Rogers* and has been consistently recognized by this Court since. Principles of *stare decisis* are at their apex in situations such as this where this Court is asked to reexamine its longstanding interpretation of statutory language. The Seventh Circuit provides a framework for reconciling this Court's facially conflicting statements regarding a generic concept of proximate cause and FELA's relaxed causation standard. Courts and practitioners can safely use the label proximate cause only if the term is used in the generic sense and it can be expressly tailored to accurately reflect the plain language of the statute. This Court has repeatedly defined FELA causation as

relaxed. There is no justification for deviating from this definition. Attaching a label to FELA causation does not change that standard.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

ROBERT McBRIDE,

Respondent.

On Writ Of Certiorari to the United States Court of Appeals For the Seventh Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Association for Justice ("AAJ") respectfully submits this brief as *amicus curiae* in support of the Respondent. Letters from the parties giving consent to the filing of this amicus brief accompany this filing.[1]

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil suits, including personal injury actions, consumer lawsuits, and employment-related cases. Many AAJ attorneys represent injured workers entitled to pursue their legal remedies under the Federal Employers' Liability Act.

AAJ believes that the lower court correctly upheld the jury's verdict under this Court's long-settled precedents. To adopt Petitioner's novel construction would undermine Congress's purpose in enacting this important legislation.

SUMMARY OF THE ARGUMENT

1. This Court has already addressed and answered the issue presented here: An injured worker suing his or her employer under the Federal Employers' Liability Act, 45 U.S.C. § 51 ["FELA"] is not required to introduce proof of "proximate cause" in addition to proving the employer's negligence in fact caused the injury.

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[1] Pursuant to Rule 37.6, *Amicus Curiae* discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *Amicus Curiae*, its members, or counsel make a monetary contribution to its preparation.

There is no basis in the Act for such a requirement. The FELA provides that an employee may recover for an injury "resulting in whole or in part from" the railroad's negligence. Nothing in the statutory text or in the legislative history even suggests any additional requirement. Indeed, Congress did not employ the phrase "by reason of" which this Court has construed as incorporating common law proximate cause. The FELA's "resulting from" language, in other statutes, has been interpreted as requiring only factual causation.

Nor is there any basis for Petitioner's contention that the FELA was meant to incorporate proximate cause as it was known at common law. The FELA cause of action is governed by federal law. In interpreting elements of the federal remedy, the principles of the common law are accorded great weight, but they are not determinative.

Congress clearly did not intend courts to apply the common law concept of proximate cause in FELA actions. First, at the time Congress enacted the FELA, proximate cause was a recent, confused, and misleading concept, variously and inconsistently defined by the courts to limit the liability of America's fledgling industries, particularly the railroads. Common law courts, including this Court, sharply disagreed on its meaning and application. Secondly, FELA expands worker protections. Congress certainly did not incorporate into the FELA a common law rule that courts had used to deny workers their common law remedies, prompting Congress to enact the FELA statutory remedy.

2. Although the Court used the term "proximate cause" in early FELA cases, it was not

referring to the general common law doctrine designed to shield tort defendants. Instead, it was the version of proximate cause developed by this Court under federal common law specifically for FELA cases.

That development was informed by the context in which Congress acted. The railroads brought progress and prosperity to America in the nineteenth century, but exacted a terrible toll on railroad workers. Congress enacted the Federal Employers' Liability Act in 1908 in an effort to reduce the horrific number of workers injured and killed on the job. Congress sought to enable workers and their families to overcome common law barriers to presenting their cases to the jury and obtaining recovery. By holding railroads accountable for the harm caused by their negligence, Congress sought to establish a financial incentive for improving workplace safety. This Court sought to carry out this legislative purpose by a liberal construction of the FELA remedy.

The Court's standard for proof of causation in FELA cases unlike the stringent proximate cause rules applied by common law courts, is jury-centered. A FELA plaintiff is required to present evidence from which a jury could reasonably infer that the employer's negligence played a part, however slight, in causing the plaintiff's injury. The Act does not require any particular type of evidence. Instead, the focus of judicial review is whether the jury could reasonably draw this inference from all the evidence, regardless of whether the court might have come to a different conclusion.

Not only has this Court consistently adhered to this relaxed causation standard, it has explicitly rejected the proximate cause standard urged by Petitioner in this case. CSXT contends that its insistence that McBride use wide-body locomotives for switching operations was deemed negligent because it created a risk of possible collision or derailment. But no such incident occurred here. Petitioner argues that its negligence did not proximately cause McBride's hand injury because his injury was completely outside the scope of the risk created by CSXT.

Although a few early FELA decisions by this Court appear to lend support to this "scope of the risk" theory of proximate cause, the Court quickly and definitively declared that it rejected such a narrow view of causation under the Act.

3. This Court also should not require that juries in FELA cases be instructed that the plaintiff must establish proximate cause as a separate element. Parties are not entitled to instructions that are confusing or misleading. Courts and legal scholars overwhelmingly agree that "proximate cause" is one of the most confusing and misleading terms in the legal lexicon. It is all the more confusing to jurors. Empirical studies confirm that a large percentage of jurors misunderstand proximate cause instructions. Most states do not attempt to distinguish between proximate cause and but-for cause in their pattern jury instructions used in common law tort actions. A growing number eschew use of the term "proximate cause" altogether. There is no persuasive reason for this Court to require such an instruction in FELA cases.

This Court should, as it has on previous occasions, adhere to its settled precedents and to its support of Congress's purposes in enacting this important legislation.

ARGUMENT

I. CONGRESS DID NOT WRITE INTO THE FELA THE UNJUST AND ILL-DEFINED COMMON LAW RULES OF PROXIMATE CAUSE, BUT INSTEAD CHARGED THE COURTS WITH DEVELOPING A FEDERAL COMMON LAW OF CAUSATION TO FURTHER THE AIMS OF THE STATUTE.

This Court has already addressed and answered the issues raised by Petitioner in this case. CSXT asks this Court to amend the Federal Employers' Liability Act, 45 U.S.C. § 51 and impose upon claimants an additional proof requirement that is not present in the text of the Act and which contravenes this Court's long-settled construction of that statute. Petitioner would turn back the clock and cast aside this Court's long-settled precedents under *federal* common law and resurrect one of the ill-defined and unjust old common law barriers to worker recovery that prompted Congress to enact the FELA in the first place.

This Court long ago made clear its understanding of the FELA:

> [I]nstead of a detailed statute codifying common-law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to

> the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. But it is clear that the general congressional intent was to provide liberal recovery for injured workers.

Kernan v. Am. Dredging Co., 355 U.S. 426, 432 (1958).

This Court should, as it has on previous occasions, "decline to blur, blend, or reconfigure our FELA jurisprudence in the manner urged by the petitioner [and instead] adhere to the clear line our recent decisions delineate." *Norfolk & W. Ry. v. Ayers*, 538 U.S. 135, 141 (2003).

A. In Enacting a Statutory Legal Remedy for Injured Workers, Congress Did Not Incorporate Common Law Rules that Had Denied Workers Their Common Law Remedies.

Petitioner CSXT required locomotive engineer Robert McBride to perform rail car switching operations using a wide-body locomotive normally used on long hauls. Repeated use of the more difficult independent brake equipment over the course of a ten-hour shift caused McBride's hand to go numb, and as he reached for the brake lever, he smashed his hand on it. *See McBride v. CSX Transp., Inc.*, 598 F.3d 388, 389-90 (7th Cir. 2010). The resulting injury required medical and surgical treatment and has left McBride with pain and impairment. *Id.* at 390. In this FELA action against

the railroad, a federal district court jury returned a verdict in Mr. McBride's favor, finding his injury resulted from CSXT's negligence, which the Court of Appeals for the Seventh Circuit upheld. *Id.*

Petitioner concedes that in this case the "evidence permits a finding that CSXT's negligence was" a "but for" cause of McBride's injury," but contends it was not a "proximate cause." Pet. for Cert. at 14. In short, Petitioner asks this Court to hold that an FELA plaintiff must not only prove that the employer in fact caused the injury, but also satisfy a separate proof requirement. *Id.*[2]

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[2] CSXT does not identify what evidence was lacking in the trial below nor suggest that it was precluded from arguing lack of causation. It does not defend its proposed instruction, Pet'r's Br. 19 n.3, but argues only that "a properly instructed jury unquestionably could have found" in CSXT's favor on the issue. *Id.* at 32. This Court has made clear with respect to causation in FELA cases,

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body.

Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29, 35 (1944).

1. The statutory text contains no indication that Congress intended to require proof of proximate cause in FELA cases.

CSXT fails to establish any basis under the Act for such a requirement. It admits that "[t]he only language in the Act that addresses causation appears in Section 1, which provides that an employee may recover for an injury 'resulting in whole or in part' from the railroad's negligence." Pet'r's Br. 23 (quoting 45 U.S.C. § 51). CSXT correctly notes that the statute makes no mention at all of proximate cause. *Id.* Consequently, this Court has declined to read into the FELA any additional requirement. "[N]othing in either the language or the legislative history discloses expressly an intent to exclude from the Act's coverage any injury resulting 'in whole or in part from the negligence' of the carrier." *Urie v. Thompson*, 337 U.S. 163, 181 (1949).

CSXT nonetheless contends that its "reading of FELA follows from the ordinary meaning of the statutory language, which governs when, as here, a term is not defined in the statute." Pet'r's Br. 25.

Confessing the complete absence of authority that might support its reading of the FELA, CSXT resorts to this Court's construction of *other* statutes, notably the Sherman Act, 15 U.S.C. § 15(a). *See* Pet'r's Br. 47-48. Those examples provide no support for CSXT's reading of the FELA text. To the contrary, as this Court explains in the very decision CSXT relies on, its conclusion that Congress incorporated common-law proximate cause into the Sherman Act was not based on a "literal reading of

the statute," but rather on "the larger context in which the entire statute was debated." *Associated Gen. Contractors of Cal. Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529 & 530 (1983). The context in which Congress considered the FELA, as Amicus demonstrates below, clearly indicates that Congress intended to reject, not incorporate, the restrictive proximate cause rule of the common law.

By contrast, the phrase "results from," which is similar to the FELA text, in at least some circumstances indicates that Congress does *not* require proximate cause. For example, in *United States v. Atkins*, 289 Fed. Appx. 872, 876 (6th Cir. 2008), the court held that 21 U.S.C. § 841(b)(1)(C), imposing prison sentence if the defendant has a prior drug conviction, sells illegal drugs, and "death or serious bodily injury results from the use of" those drugs, does not require proof of proximate cause. Chief Judge Boggs, writing for the court noted that six other circuits "have held that the use of the passive words 'if death or serious bodily injury results from the use of' eliminates any requirement that the distribution be the proximate cause of the victim's death," citing *United States v. Houston*, 406 F.3d 1121, 1124 (9th Cir. 2005); *United States v. Carbajal*, 290 F.3d 277, 284 (5th Cir. 2002); *United States v. Soler*, 275 F.3d 146, 153 (1st Cir. 2002); *United States v. McIntosh*, 236 F.3d 968, 973 (8th Cir. 2001); *United States v. Robinson*, 167 F.3d 824, 831 (3d Cir. 1999); *United States v. Patterson*, 38 F.3d 139, 145 (4th Cir. 1994). *See also United States v. Hatfield*, 591 F.3d 945, 948 (7th Cir. 2010) ("[T]he statutory term 'results from' required the government to prove that ingestion of the

defendants' drugs was a 'but for' cause of the deaths and the bodily injury").

2. Congress would not have intended that courts undermine the FELA statutory remedy by incorporating common law proximate cause, which was an ill-defined rule used to deny remedies to injured workers.

CSX is incorrect in stating that "FELA was meant to incorporate the common law," Pet'r's Br. 20, or that any aspect of the remedy that is not defined in the text "is consequently governed by the common law." *Id.* at 24.

The FELA cause of action is governed by federal substantive law. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 165 (2007). "Absent express language to the contrary, the elements of a FELA claim are determined *by reference to* the common law." *Id.* at 165-66 (emphasis added) (citing *Urie v. Thompson*, 337 U.S. 163 (1949)). In this analysis, common law principles "are entitled to great weight." *Sorrell*, at 168; *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 145 (2003); *Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424, 429 (1997); *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994). At the same time, this Court has cautioned, they are "not necessarily dispositive." *Sorrell*, at 168; *Gottshall*, at 544.

There are two compelling reasons to reject CSXT's assertion that Congress intended to incorporate the common law rules of proximate cause

into the FELA. First, those rules were at the time Congress was considering the FELA (as well as now) an ill-defined, vague, contradictory and confusing jumble of judge-made limitations on liability. Second, proximate cause was one of the judge-made rules that common law employed to deny a remedy, which prompted Congress to enact FELA in the first place.

CSXT bases its incorporation argument on the assumption that "proximate cause" was a venerable common law concept that carried a "universal" meaning accepted "in all jurisdictions." Pet'r's Br. 22.[3] That is famously not the case.

"Proximate cause" at the close of the nineteenth century was a recent invention in the law

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[3] For this proposition, CSXT cites *Raab* v. *Utah Ry.*, 221 P.3d 219, 230 (Utah 2009), Pet'r's Br. 22, which in turn cites four decisions. Tellingly, each of those decisions offers a different definition of proximate cause, none of which appears to match CSXT's. *See Stewart* v. *Federated Dep't Stores*, 662 A.2d 753, 757 (Conn. 1995) (proximate cause means "a substantial factor in the resulting harm"); *Transp. Indem. Co.* v. *Page*, 406 P.2d 980, 986 (Okla. 1963) ("The proximate cause of an injury must be the efficient cause which sets in motion the chain of circumstances leading to the injury."); *Kent* v. *Commonwealth*, 771 N.E.2d 770, 777 (Mass. 2002) (Proximate cause depends on "whether the injury to the plaintiff was a foreseeable result of the defendant's negligent conduct."); *Stahl* v. *Metro. Dade County*, 438 So. 2d 14, 17 (Fla. Ct. App. 1983) ("[T]o constitute proximate cause there must be such a natural, direct, and continuous sequence between the negligence act [or omission] and the [plaintiff's] injury that it can reasonably be said that but for the [negligent] act [or omission] the injury would not have occurred.").

of torts.[4] Like the defenses of contributory negligence, assumption of the risk, and the fellow servant doctrine, it was devised and promoted by the railroads' legal departments and adopted by courts who saw the necessity of protecting America's fledgling industry from the burden of liability for the harms they cause. *See, e.g.*, Lawrence M. Friedman, *A History of American Law* 409-11 (1973); Morton J. Horwitz, *The Transformation of American Law, 1870-1960* 85-89 (1977); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L.J. 499, 515-17 (1961); Edmund Ursin, *Judicial Creativity in Tort Law*, 49 Geo. Wash. L. Rev. 229, 259-63 (1981); Stuart Speiser, *Lawsuit* 120, 122, 124-26 (1980); *cf.* Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 Yale L.J. 1717, 1719-20 (1981) (concluding from a survey of reported tort decisions that the common law courts of the late 19th century were not broadly protective of business, but were notably hostile to claims by injured employees, especially railroad workers).

CSXT insists that we "need not consult a dictionary to know that the ordinary meaning" of the FELA text supports its definition of proximate cause.

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[4] The law of negligence was itself very new. The first American torts treatise was not published until 1859. John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-party Insurance Movement*, 114 Harv. L. Rev. 690, 703 (2001). Lawsuits arising out of the harms wrought by railroads and factories quickly became its primary focus. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 467 (1897).

Pet'r's Br. 25.[5] That, too, is not the case. As the court of appeals correctly noted, "There is not currently, and was not at the time of the FELA's passage, a uniform or generally accepted definition of proximate cause." 598 F.3d at 393 n.3.

When Congress enacted the FELA, the common law notion of proximate cause was "a chaos of confusion and uncertainty" where judges expressed "a kaleidoscope of 'rules' of which each confessedly is subject to indefinite exceptions and not one is based on a satisfactory foundation." *See* Joseph W. Bingham, *Some Suggestions Concerning "Legal Cause" at Common Law*, 9 Colum. L. Rev. 16, 16-17 (1909). A contemporary judge lamented that that the term "has been productive of infinite confusion and error" and is "always ambiguous." Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 Harv. L. Rev. 103, 106 & 107 (1911). A practitioner described six separate formulations of proximate cause that were known at common law and added, "The Supreme Court has failed to adopt any of these tests or rules of causation." William H. DeParcq, *A Decade of Progress Under the Federal Employers' Liability Act*, 18 Law & Contemp. Probs. 257, 266-67 (1953).

Congress clearly did not incorporate such a contradictory and contentious rule into its statutory

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[5] Even dictionary definitions are not entirely helpful. As Judge Posner has noted, "primary cause" is listed in Black's law dictionary as a synonym for "proximate cause." *United States v. Hatfield*, 591 F.3d 945, 949 (7th Cir. 2010). Even CSXT does not contend that proximate cause means primary cause. *See* Pet'r's Br. 24.

cause of action when it was *expanding* the remedies available to injured workers.

One example, which was likely known to Congress, illustrates both the unsettled meaning of proximate cause and its overt use by courts to shield the railroads from liability. In the famous case of *Ryan v. New York Central Railroad Co.*, 35 N.Y. 210 (1866), defendant's locomotive set a wood shed on fire, which spread to plaintiff's house 130 feet away. Acknowledging the difficulty in reconciling the common law cases, the court nonetheless held that the destruction of plaintiff's house was too remote and was therefore not proximately caused by defendant's negligence. To hold otherwise would create a liability "that no private fortune would be adequate" to meet and "which would be the destruction of all civilized society." *Id. See also* Friedman, *supra* at 410-11, criticizing *Ryan* as a conspicuous example of judicial protectiveness of the railroads and hostility toward common law tort remedies in the nineteenth century.[6]

This Court, however, emphatically rejected this direct/remote notion of proximate cause in *Milwaukee & Saint Paul Railway Co. v. Kellogg*, 94 U.S. 469 (1876). There defendant's steam boat set

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[6] CSX appears to support this restrictive proximate cause rule, quoting Justice Holmes' dictum in a different, non-injury context that the "general tendency of the law . . . is not to go beyond the first step [and] does not attribute remote consequences to a defendant." Pet'r's Br. 21 (quoting *S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 534 (1918)). Justice Holmes clearly did not apply this restrictive view of causation in FELA cases. *See, e.g., Union Pac. R. Co. v. Hadley*, 246 U.S. 330, 333 (1918).

fire to a wooden elevator on the river bank, from which the fire spread to plaintiff's saw mill and lumber. This Court upheld the judgment against the railroad. The Court explicitly disagreed with *Ryan* and similar cases, emphasizing that "proximate cause of an injury is ordinarily a question for the jury," which in this case found "no intervening and independent cause" of the harm. *Id.* at 474-75.

Despite the absence of a clear or universally accepted definition, at the end of the nineteenth century, proximate cause was one of "a number of judge-made rules [that] circumscribed the availability of damages recoveries in both tort and contract litigation." *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 532 (1983).

The California Supreme Court similarly recognized that comparative negligence, along with "'concepts of duty and *proximate cause*, [provided] a convenient instrument of control over the jury, by which the liabilities of rapidly growing industry were curbed and kept within bounds.'" *Am. Motorcycle Ass'n v. Superior Court*, 578 P.2d 899, 904-05 (Cal. 1978) (quoting William Prosser, *Comparative Negligence*, 41 Cal. L. Rev. 1, 4 (1953)). The Virginia Supreme Court recently noted that "employees lost approximately eighty percent of their cases" because of "narrow common law theories" including proximate cause. *Simms v. Ruby Tuesday, Inc.*, 704 S.E.2d 359, 361 (Va. 2011) (quoting Samuel B. Horovitz, *Assaults and Horseplay Under Workmen's Compensation Laws*, 41 Ill. L. Rev. 311, 311 (1946)). *See also* Friedman, at 411 (noting that courts used "proximate cause" concepts to protect railroads from

juries even prior to widespread adoption of contributory negligence).

Clearly Congress would not have incorporated into the FELA, without so stating, the restrictive common law rules of proximate cause which had barred workers' remedies and prompted Congress to enact the statutory remedy.

B. The Federal Common Law Rules of Causation in FELA Cases Reflect the Intent of Congress to Remove Common Law Barriers to Recovery for Injuries Resulting from an Employer's Negligence.

1. The context in which Congress enacted the FELA demonstrates that Congress intended railroads to be held accountable for worker safety and compensation of injury.

Interpretation and application of FELA's remedy is a matter of federal common law, which does not share the same goals as the non-statutory general common law of torts. Instead, the federal common law aims to interpret the statute, guided by the purposes of the Act. That determination is made within "the larger context in which the entire statute was debated." *Associated Gen. Contractors*, at 530. That background makes clear that Congress's primary goal was to lower the common law barriers that had precluded recovery by injured railroad workers.

The railroads brought rapid progress and prosperity to Americans across the country, *see* Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 Yale L.J. 1717, 1748 (1981); William L. Withuhn, *How the Railroads Built America; Railroads Have Been Essential to the Growth of America For Generations. The Next Generation Is Just Beginning*, Railway Age, Sept. 2006. But there is a "dark and bitter" side to this story. Melvin L. Griffith, *The Vindication of a National Public Policy under the Federal Employers' Liability Act*, 18 Law & Contemp. Probs. 160, 163 (1953). Ever-growing numbers of workers were killed and injured by huge machines lacking basic safety protections. "In the second half of the nineteenth century, the United States experienced an accident crisis like none the world had ever seen and like none any Western nation has witnessed since." John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative Firstparty Insurance Movement*, 114 Harv. L. Rev. 690, 694 (2001). The rates of death and serious injury to railroad workers were "astronomical." Of all employees killed in Massachusetts between the late 1850s and 1880, 64 percent were railroad employees. Walter Licht, *Working For The Railroad: The Organization of Work in the Nineteenth Century* 124-29 (1983). In 1890, one railroad worker in every three hundred was killed on the job; a rate four times higher than in Great Britain. Among freight railroad brakemen, one in every hundred died in work accidents *each year*. Witt, *supra*, at 694-95; Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System As a Battleground of Social Theory*, 68 Brook. L. Rev. 1, 27 & n.167 (2002);

Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 Harv. J. on Legis. 79, 81 (1992) ("The injury rate among railroad employees in the late nineteenth century was horrific—the average life expectancy of a switchman was seven years, and a brakeman's chance of dying from natural causes was less than one in five.").

This Court noted that President William Henry Harrison, "in his annual messages of 1889, 1890, 1891, and 1892, earnestly urged upon Congress the necessity of legislation to obviate and reduce the loss of life and the injuries" among railroad workers. *Johnson v. S. Pac. Co.*, 196 U.S. 1, 19 (1904).

At this time, "public attention had focused on abuses by the railroads, including a perceived industry indifference to the hazards facing railroad workers." Baker, *supra*, at 81-82. Congress responded in 1893 by enacting the Federal Safety Appliance Act, which required safety equipment, including automatic couplers and air brakes. Act of Mar. 2, 1893, ch. 196, 27 Stat. 531 (codified as amended at 45 U.S.C. §§ 1-7 (1988)).

Yet, the human toll continued to rise. Interstate Commerce Commission figures reveal that "The railway injury rate doubled in the seventeen years between 1889 and 1906." At the time Congress enacted the FELA in 1908, casualties to trainmen on the interstate railroads of the United States totaled 281,645. 45 Cong. Rec. 4034 (1910).

Because "the legal system offered little or no relief," and no social safety net existed, "[w]orkers

disabled in accidents and the widows and families of deceased railwaymen faced a grim and uncertain future." Licht, *supra*, at 197. A Baltimore newspaper reported that two brakemen had "thrown themselves under the wheels," and others had contemplated suicide due to the dangers, working conditions, and financial stress of their jobs. *Id.*

Congress, in 1906, enacted the precursor to the FELA, expressing its desire to "do something toward stopping the fearful slaughter of human life and destruction of human limbs by our railroads." 40 Cong. Rec. 4607 (1906). Civil liability for injury, in that Congress's view was not a destructive burden, but a financial incentive for safety. "The only manner in which [railroads] can be persuaded to take reasonable care of their employees is by holding them responsible in damages for the absence of such care." 40 Cong. Rec. 4605 (1906).

Much of the credit for this accomplishment may be accorded to Edward A. Moseley, the first Secretary of the new Interstate Commerce Commission in 1887. A former seaman, Moseley devoted his career to securing federal protections for the rights of railroad employees. Griffith, *supra*, at 164-65. His efforts led to the enactment, over strenuous industry opposition of the Safety Appliance Act, 45 U.S.C. §§ 1-43a (1988), and the Boiler Inspection Act, now codified at 45 U.S.C. § 23 (1988). *See generally*, James Morgan, *The Life Work of Edward A. Moseley in the Service of Humanity* 57-62 (1913).

In 1895, Moseley drafted the first Employers' Liability Act to be introduced in Congress. President Theodore Roosevelt threw his support behind the

proposal, declaring to Congress that, "The practice of putting the entire burden of loss to life or limb upon the victim or the victim's family is a form of social injustice." 42 Cong. Rec. 73 (1907).

This Court struck the 1906 legislation as exceeding Congress's commerce powers. In the *Employers' Liability Cases*, [*Howard v. Illinois Central Railroad Co.*,] 207 U.S. 463 (1908), Congress quickly responded, enacting the current version of FELA to address "mounting concern about the number and severity of railroad employees' injuries." *Sorrell*, at 165.

The Act created a federal cause of action for damages due to "injury or death resulting in whole or in part from the negligence" of the railroad. 45 U.S.C. § 51. Congress's purpose was broad, most expansively stated in a report by the Senate Committee on the Judiciary accompanying an amendment to the Act in 1910:

> [To] place such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the lives and limbs of the men in this dangerous employment. The tremendous loss of life and limb on the railroads of this country is appalling. . . .
>
> It was the intention of Congress . . . to shift the burden of the loss resulting from these casualties from "those least able to bear it" and place it upon those who can, as the Supreme Court said in [*St. Louis & Iron Mountain & Southern*

> *Railway v. Taylor*, 210 U. S. 281, 295-96 (1908)], "measurably control their causes."
>
> [The FELA stands as] a declaration of public policy *to radically change, as far as congressional power can extend, those rules of the common law* which the President, in a recent speech at Chicago, characterized as "unjust." President Taft in his address at Chicago, September 16, 1909, referred "to the continuance of unjust rules of law exempting employers from liability for accidents to laborers."
>
> This public policy which we now declare is based upon the *failure of the common-law rules* as to liability for accident, to meet the modern industrial conditions.

Sen. Committee on the Judiciary, S. Rep. No. 432, 61st Cong. 2nd sess., 45 Cong. Rec. 4034 (1910) (emphasis added). This Court upheld the Act's validity. *Second Employers' Liability Cases*, [*Mondou v. New York, N.H. & H.R. Co.*], 223 U.S. 1 (1912).

The crucial means of accomplishing this purpose, in Congress's view, was to enable workers to present their cases to juries of their fellow Americans, overcoming judge-made common law barriers and judicial bias in favor of the railroads. *See Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 508-09 (1957). For that reason, Congress made the right to trial by jury "part and parcel" of the remedy under FELA. William E. Davis, III, *The Jury A Block Away: The False Conflict Between Texas and Federal Jury*

Trial, 56 Baylor L. Rev. 671, 687 (2004); *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 363 (1952); *Bailey v. Cent. Vt. Ry.*, 319 U.S. 350, 354 (1943).

The powerful social history that led Congress to enact the FELA informed this Court's interpretation of the statutory remedy:

> This limited liability [of railroad employers at common law] derived from a public policy, designed to give maximum freedom to infant industrial enterprises. . . . But it came to be recognized that, whatever the rights and duties among persons generally, the industrial employer had a special responsibility toward his workers, who were daily exposed to the risks of the business and who were largely helpless to provide adequately for their own safety.

Kernan v. Am. Dredging Co., 355 U.S. at 430-31.[7]

The Act must therefore be given "liberal construction in order to accomplish [Congress's] objects." *Urie v. Thompson*, 337 U.S. 163, 180 (1949). "The language is as broad as could be framed . . . The wording was not restrictive as to the employees

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[7] In 1920, Congress made the FELA remedy applicable to seamen under the Jones Act, 46 U.S.C. § 30104(a). *See Am. Dredging Co. v. Miller*, 510 U.S. 443, 456 (1994). Consequently, "[u]nder both statutes, the plaintiff bears a reduced burden of proof with respect to causation." *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 47 & n.8 (2d Cir. 2004) (Sotomayor, J.).

covered; *the cause of injury*, . . . or the particular kind of injury resulting. *Id.* at 180-81 (emphasis added). Rather, "it is clear that the general congressional intent was to provide liberal recovery for injured workers." *Kernan*, at 432.

II. FELA REQUIRES SUFFICIENT EVIDENCE FOR A JURY TO INFER THAT THE RAILROAD'S NEGLIGENCE RESULTED IN WHOLE OR IN PART IN PLAINTIFF'S INJURY.

A. This Court Has Developed a Causation Requirement Specific to the FELA Which Is Separate From the Proximate Cause of the Common Law.

This Court has developed the FELA remedy as Congress directed under the federal common law, including rules of causation suited to accomplishing the remedial purpose of the Act. CSXT cites early FELA cases in which this Court employed the phrase "proximate cause." Pet'r's Br. 30-31 n.7, and strenuously argues that *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500 (1957) "did not abandon proximate causation." Pet'r's Br. 33. But the "proximate cause" referred to in *Rogers* and other cases cited by Petitioner was not the proximate cause of the general common law. "It would be more accurate," as Justice Ginsberg has stated, to recognize that the Court in these cases "describes the test for proximate causation *applicable in FELA suits*." *Sorrell*, at 812-13 (Ginsberg, J. concurring).

To hold otherwise would freeze the law governing FELA claims in the mold of the general

common law of torts in 1908, because the federal courts have no authority to develop that body of law:

> There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or "general," be they commercial law *or a part of the law of torts*. And no clause in the Constitution purports to declare such a power upon the federal courts.

Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (emphasis added).

The federal common law regarding causation, which Justice Ginsberg referred to as specifically "applicable in FELA suits," was described, even before *Rogers*, as having a "tendency to liberalize the requirement of causal connection, and afford an ever wider scope to the ambit of jury authority." William H. DeParcq, *A Decade of Progress Under the Federal Employers' Liability Act*, 18 Law & Contemp. Probs. 257, 271 (1953). The Court "avoided adherence to any proximate cause doctrine left over from the general common law, *id.* at 270, and adopted in its place a "more expansive" rule, *Eglsaer v. Scandrett*, 151 F.2d 562, 565-66 (7th Cir. 1945); John M. Ennis, *An Analysis of Judicial Interpretation and Application of Certain Aspects of the Federal Employers' Liability Act*, 18 Law & Contemp. Probs. 350, 351 (1953) (similar).

B. The FELA Requires Only Sufficient Evidence from Which a Jury Could Reasonably Infer That the Employer's Negligence Played Any Part in Plaintiff's Injury.

The FELA causation test developed by this Court, unlike the stringent proximate cause rules of the common law courts, is jury-centered. A FELA plaintiff is "required to present probative facts from which the negligence and the causal relation could reasonably be inferred." *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 32 (1944). "If that requirement is met, . . . [n]o court is then justified in substituting its conclusions for those of the twelve jurors." *Id.* at 33.

The Court also made clear that a plaintiff is not obliged to introduce particular evidence that can be specifically labeled "proof of proximate cause." Causation is an inference that may be drawn from the totality of facts shown to the jury. Thus "focal point of judicial review is the *reasonableness of the particular inference or conclusion drawn by the jury*. It is the jury, not the court, which is the fact-finding body." *Id.* at 35 (emphasis added).

This Court has consistently applied this standard in reviewing FELA cases. *See, e.g., Tiller v. Atl. Coast Line R.R.*, 323 U.S. 574, 578 (1945); *Schulz v. Pa. R. Co.*, 350 U.S. 523 (1956) ("The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable."); *Rogers*, 352 U.S. at 506) ("the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played a part, even the

slightest, in producing the injury or death for which damages are sought."); *Gottshall*, 512 U.S. at 543 (quoting *Rogers*); *Gallick v. B&O R.R.*, 372 U.S. 108, 116 (1963) (the controlling question on causation was "whether there was evidence . . . enough to justify a jury's determination that employer negligence had played any role in producing the harm.")

C. This Court Has Rejected the Definition of Proximate Cause Urged by Petitioner.

The causation requirement this Court has devised for FELA cases, whether or not referred to as "proximate cause," does not in any way resemble the standard advocated by Petitioner here. Indeed, CSXT's "scope of the risk" formulation is one definition of proximate cause that this Court has squarely and explicitly rejected.

CSXT contends that its actions were deemed negligent in requiring McBride to use a wide-body locomotive to perform switching operations due to the risk of derailment and "possibly putting something on the ground." Pet'r's Br. 6. "There was no derailment or collision in this case, however." *Id.*

CSXT argued in its Petition:

> McBride's theory of negligence was that his assigned train . . . was unsafe because of its propensity to cause derailment or collision, not because of its propensity to cause imprecise hand movements . . . Yet McBride was injured while operating the brake, not in a rail accident.

Pet'r's Br. 29. The jury could have found that the risk created by CSXT's breach of duty was "a different kind of loss from the one that materialized." *Id.* at 29-30.

There was at least some support in pre-FELA common law decisions for this "scope of the risk" definition of proximate cause. *See* Joseph W. Bingham, *Some Suggestions Concerning "Legal Cause" at Common Law*, 9 Colum. L. Rev. 16 (1909). An early FELA decision by this Court appears to have employed that approach. In *St. Louis & San Francisco Railroad Co. v. Conarty*, 238 U.S. 243 (1915), a brakeman was fatally crushed when the engine he was riding collided with a rail car. Had the car been equipped with a drawbar and automatic coupler, as required by the Safety Appliance Act, they would have maintained sufficient space between the car and the front of the engine where the brakeman was riding. The court held, however, that the railroad's violation was not a proximate cause of the brakeman's death. Automatic couplers are required to prevent injury to workers walking between the cars to manually couple or uncouple cars, not "to provide a place of safety between colliding cars." *Id.* at 250. The court concluded that proximate cause is lacking "where a duty is imposed for the protection of persons in particular situations or relations a breach of it which happens *to result in injury to one in an altogether different situation.*" *Id.* at 249 (emphasis added). In a very similar case, *Lang v. New York Central Railroad Co.*, 255 U.S. 455 (1921), a brakeman's leg was fatally crushed when the rail car he was riding collided with a car that was missing an automatic coupler. The Court, relying on *Conarty*, overturned a verdict for the

widow, holding that the "absence of the coupler and drawbar was not the proximate cause of the injury, nor was it a concurring cause." *Id.* at 458.

Shortly after *Conarty*, this Court decided *Louisville & Nashville Railroad Co. v. Layton*, 243 U.S. 617 (1917), where a switchman was thrown from the top of a car in a collision that would not have occurred if the cars had been equipped with non-defective automatic couplers. The Court upheld a verdict for the plaintiff, rejecting the railroad's argument that the sole purpose of the automatic coupler requirement was to prevent the risk of workers going between cars to couple them, not to protect employees riding on top of cars. *Id.* at 620. Similarly, in *Minneapolis & St. Louis Railroad Co. v. Gotschall*, 244 U.S. 66 (1917), a brakeman walking along the top of a moving train was thrown off and killed when the train separated because of the opening of a defective coupler. This Court sustained a judgment against the railroad although the injury was not one which the Safety Appliance Act coupler requirement sought to prevent.

This Court resolved the conflicting authorities in *Davis v. Wolfe*, 263 U.S. 239 (1923) where the plaintiff was injured when he fell from a moving train due to the defective condition of a grab iron. The Court rejected the railroad's argument, based on *Conarty* and *Lang*, that the grab iron was required to mitigate the risk to employees engaged in coupling or uncoupling cars, not to assist riding moving cars. The Court rejected this contention and held that *Layton* and *Gotschall* had made clear that an employee can recover under FELA for injury caused by a railroad's negligence in violating the Safety

Appliance Act "while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection." *Id.* at 243.[8]

Similarly, in *Coray v. Southern Pacific Co.*, 335 U.S. 520 (1949), Plaintiff was injured while riding a track car that struck the back of a train that had unexpectedly stopped due to defective brakes. The railroad argued that the scope of the risk created by defective breaks extended to those who might be injured by a *moving* train, not to an employee injured by a *stopped* train. Justice Black responded for the Court, "We do not view the Act's purpose so narrowly." *Id.* at 522. Emphasizing that "[t]he language selected by Congress to fix liability in cases of this kind is simple and direct," the Court concluded that a jury viewing all the circumstances could have found the employee's death resulted from the defective brakes. *Id.* at 524. *See also Kernan*, 355 U.S. at 432 (Noting that common law "tort doctrine imposes liability for violation of a statutory duty only where the injury is one which the statute was designed to prevent." However, this Court *has repeatedly refused to apply such a limiting doctrine in FELA cases.*) (emphasis added).

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[8] The Utah Supreme Court, in a decision relied on by CSXT, explains that this Court's decision in *Davis* supports the railroad's liability in this case: "*Davis* makes clear that in cases where the employer's negligence was not the direct cause of the employee's injury, the negligence is nonetheless a proximate cause of the injury if the injury occurred while the employee was discharging the duty that devolved on him or her by reason of the employer's negligence." *Raab v. Utah Ry.*, 221 P.3d 219, 230-31 (Utah 2009).

Plaintiff in this case introduced sufficient evidence from which the jury could infer that his hand injury resulted from CSXT's negligence while engaged in performing his duties as a locomotive engineer. Under this Court's FELA causation test, that is sufficient.

> [W]here, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

Lavender v. Kurn, 327 U.S. 645, 653 (1946).

III. THIS COURT SHOULD NOT REQUIRE THAT FELA JURIES BE INSTRUCTED REGARDING PROXIMATE CAUSE.

Finally, this Court should reject Petitioner's invitation to require that juries in FELA cases be instructed that the plaintiff is required to prove proximate cause. Pet'r's Br. 19 n.3.

A party requesting a jury instruction must show not only that it is a correct statement of the law, but also that the proposed instruction is not confusing or misleading. *White v. Ford Motor Co.*, 312 F.3d 998, 1012 (9th Cir. 2002); *see* 89 C.J.S.

Trial § 583.[9] Significantly, Petitioner has not identified a single case in which it was reversible error to refuse to charge the jury on the requirement and definition of proximate cause.[10]

To hold that an FELA defendant is entitled to so instruct the jury would impose a daunting task upon trial courts. As one court recently suggested, the term proximate cause "may hold the dubious honor of having generated more confusion than any other term in the legal lexicon." *Raab v. Utah Railway Co.*, 221 P.3d 219, 226 (Utah 2009). *See also Gerst v. Marshall*, 549 N.W.2d 810, 815 (Iowa 1996) (noting the inconsistent views of "the authorities upon which we have relied."); *Busta v. Columbus Hosp. Corp.*, 916 P.2d 122, 138 (Mont. 1996) ("It is an

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[9] Although CSXT has chosen not to defend the correctness of its proposed instruction, Pet'r's Br. 19 n.3, its definition of proximate cause as a "natural or probable sequence" is clearly objectionable as suggesting that that McBride could only recover upon proof of greater than 50 percent probability of causation. *Cf. Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 353 (1988) (O'Connor, J., dissenting in part) (party may not assign error to rejection of proposed instruction that was more misleading than the instruction actually given).

[10] By contrast, the *giving* of an instruction requiring an FELA plaintiff to prove proximate cause has been held to be reversible error. *See, e.g., Hausrath v. N.Y. Cent. R. Co.*, 401 F.2d 634 (6th Cir. 1968); *Page v. St. Louis Sw. Ry. Co.*, 312 F.2d 84, 92 (5th Cir. 1963); *Dutton v. S. Pac. Transp.*, 576 S.W.2d 782 (Tex. 1978); *Collins v. Mercury S.S. Co., Inc.*, 549 S.W.2d 213 (Tex. Civ. App. 1977); *McCalley v. Seaboard Coast Line R. Co.*, 265 So. 2d 11 (Fla. 1972); *cf. Tyree v. N.Y. Cent. R.R.*, 382 F.2d 524, 529 (6th Cir.), *cert. denied*, 389 U.S. 1014 (1967) ("[I]t would be better in [FELA] cases if no mention of proximate cause whatever was made to the jury.").

unfortunate word, which places an entirely wrong emphasis upon the factor of physical or mechanical closeness.").

Torts scholars agree that there is general disagreement on even a basic definition of proximate cause:

> There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion. Nor, despite the manifold attempts which have been made to clarify the subject, is there yet any general agreement as to the best approach.

W. Page Keeton, et al., *Prosser & Keeton on Torts* § 41, at 263 (5th ed. 1984).

The *Restatement* authors have eschewed use of the term altogether. *See Restatement (Second) of Torts* § 431 (1965). The reporters for the third restatement of torts flatly declare:

> There may be no legal term in as widespread usage as proximate cause that has been as excoriated as it has. One searches in vain to find a defender of the term; its critics are legion.

Restatement (Third) of Torts: Liability for Physical Harm § 29, Reporters Note comment a. Dean Prosser declared that proximate cause "remains a tangle and a jungle, a palace of mirrors and a maze"; it is "a complex term of highly uncertain meaning" which

"covers a multitude of sins." William Prosser, *Proximate Cause in California*, 38 Cal. L. Rev. 369, 375 (1950); *see also* Leon Green, *Jury Trial and Proximate Cause*, 35 Tex. L. Rev. 357, 358 (1957) ("The 'proximate cause' doctrine, with all of its variations in meaning, is the most imprecise and most confusing of all tort-law doctrines.").

And, as Justice Ginsburg has aptly noted, If the term "proximate cause" is confounding to jurists, it is even more bewildering to jurors." *Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 180 (2007) (Ginsburg, J., concurring). *See also* Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 Vand. L. Rev. 941, 987 (2001) (the "inadequacy and vagueness of jury instructions on 'proximate cause' is notorious").

As the California Supreme Court has explained:

> [W]hen jurors hear the term 'proximate cause' they may misunderstand its meaning or improperly limit their discussion of what constitutes a cause in fact. . . . Webster's Third New International Dictionary (1981) page 1828, defines proximate as "very near," "next," "immediately preceding or following." Yet, proximity in point of time or space is no part of the definition of proximate cause.

Mitchell v. Gonzales, 819 P.2d 872, 877 (Cal. 1991) (quotation and citation omitted). The court also quoted a leading critic of California's proximate cause jury instruction: "There are probably few

judges who would undertake to say just what this means, and fewer still who would expect it to mean anything whatever to a jury." *Id.* (quoting Prosser, *Proximate Cause in California*, 38 Cal. L. Rev. at 424).

Indeed, an empirical study of jury instructions found that the proximate cause instruction produced "the most misunderstanding among lay persons." Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306, 1353 (1979). *See also* Walter W. Steele & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C.L. Rev. 77, 84 (1988) (less than half of juries in study correctly interpreted proximate-cause instructions).

In fact, a growing number of states have rejected use of the term "proximate cause" in pattern jury instructions used in common law tort actions. *See, e.g.*, Alabama Pattern Jury Instructions Civil No. 33.00 (2010); California BAJI 3.76 (2010); Florida Pattern Jury Instruction 5.1 (2010); Hawaii Jury Instruction—Civil 6.3 (1999); Indiana Model Instruction 2105 (2010); Oklahoma Uniform Jury Instructions—Civil 9.1 (2008); Pennsylvania Suggested Standard Civil Jury Instructions, 3.15 (Civ) (2008).

Moreover, many states that employ the term "proximate cause" in jury instructions do not ask jurors to distinguish but-for causation. A survey of standard jury instructions indicates that "in most states the jury is not given instructions that separate the proximate cause question from the cause-in-fact question." Patrick J. Kelley, *Restating Duty, Breach,*

and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law, 53 Vand. L. Rev. 1039, 1054 & n.8 (2001).

There is no persuasive reason for this Court to discard its settled precedents and adopt a common limitation on tort remedies at a time when many common law courts are rejecting that limitation.

CONCLUSION

For the above reasons, the decision of the Seventh Circuit Court of Appeals below should be affirmed.

Respectfully submitted,

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March 1, 2011

AMICUS CURIAE BRIEF

No. 10-235

In The Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v

ROBERT MCBRIDE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICI CURIAE* AMERICAN TRAIN DISPATCHERS ASSOCIATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION, BROTHERHOOD OF RAILROAD SIGNALMEN, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS & BLACKSMITHS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, NATIONAL CONFERENCE OF FIREMEN & OILERS DISTRICT OF LOCAL 32 BJ, SEIU, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, TRANSPORT WORKERS UNION OF AMERICA, TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION AND UNITED TRANSPORTATION UNION IN SUPPORT OF RESPONDENT ROBERT MCBRIDE

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

The American Train Dispatchers Association (ATDA), Brotherhood of Locomotive Engineers and Trainmen (BLET), Brotherhood of Maintenance of Way Employees Division (BMWED), Brotherhood of Railroad Signalmen (BRS), International Brotherhood of Boilermakers & Blacksmiths (IBBB), International Brotherhood of Electrical Workers (IBEW), National Conference of Firemen & Oilers District of Local 32 BJ, SEIU (NCFO), Sheet Metal Workers International Association (SMWIA), Transport Workers Union of America (TWU), Transportation Communications International Union (TCIU) and United Transportation Union (UTU) (collectively "Rail Labor Coalition") are employee associations and labor unions organized under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*[1]

ATDA is the collective bargaining representative for the craft of train dispatchers; BLET, locomotive engineers; BMWED, maintenance of way employees; BRS, signalmen; IBBB, boilermakers; IBEW, mechanical

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[1] Pursuant to Rule 37.6, the *Amici Curiae* unions (Coalition) state that no person or entity other than the Coalition has made any monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part. Petitioner and Respondent have consented to the Rail Labor Coalition's filing of a brief.

and communications electricians; NCFO, roundhouse and mechanical shop laborers; TCIU, clerical employees and carmen; TWU, carmen and cleaners; and UTU, conductors and other train service employees. Petitioner and Respondent have consented to the Rail Labor Coalition's filing of a brief.

Most of the members of the Rail Labor Coalition represent the employees on all of the nation's major freight railroads, Amtrak and many of the regional and short line railroads. Some of them have existed since 1863 and most were extant when the Federal Employers' Liability Act (FELA) was enacted in 1908. Together they represent well over 90% of the workers employed by the railroad industry and, separately or joined as here, have frequently appeared before Congress, administrative agencies, such as the Federal Railroad Administration (FRA) and the National Transportation Safety Board, and the courts on matters important to rail labor. Coalition members have participated in past FELA cases before this Court, such as *Norfolk Southern Ry. Co. v. Sorrell*, 549 U.S. 158 (2007), and *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003).

In virtually every congressional session during the past several decades, Rail Labor Coalition members have been forced to resist lobbying efforts by the railroad industry to abolish or weaken FELA. Most recently in 2007, the main lobbyist for the rail industry, the Association of American Railroads (AAR), asked Congress to modify the causation standard recognized

in *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957), to proximate cause; however, no action was taken to change the standard. *The Impact of Railroad Injury, Accident and Discipline Policies on the Safety of Ameican Railroads: Hearing Before the House Committee on Transportation and Infrastructure*, 110th Cong., 1st Sess., 238, 243-46 (Oct. 25, 2007) (statement of Edward Hamberger, President of AAR). In sum, for over 50 years, these efforts have failed and the 100-year old Act has remained unchanged.

The major purpose of FELA was the promotion of safety within the railroad industry. *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 329-30 (1958). In light of the safety purposes of the statute, the Court has recognized that FELA imposes a continuing and non-delegable duty on railroads to provide their employees with a reasonably safe place in which to work. *Bailey v. Vermont Central Ry. Co.*, 319 U.S. 350, 353 (1943). The position asserted by the railroad industry in this case, as a practical matter, would mean that railroads no longer have this duty, and that there would be no effective deterrent to their negligence.

FELA was also intended as remedial legislation to facilitate recovery by workers who are injured or killed in the course of their railroad employment. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994). Congress desired for injured workers to receive fair compensation for their injuries. In order

to serve Congress' humanitarian purposes in enacting FELA, the Court has consistently held that FELA altered some harsh common-law rules and thereby "shift[ed] part of the human overhead of doing business from employees to their employers." *Ayers*, 538 U.S. at 145.

In this case, the Coalition has a clear interest in assisting rail employees in protecting their rights and hopes to aid the Court in vindicating an important protection for railroad workers and public safety that is threatened by the rail industry's position herein.

SUMMARY OF ARGUMENT

The Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60, was adopted in 1908 as the safety law for railroad workers, one of the most hazardous occupations in the nation then and now. Also, then and now, the standard of causation to recover for a workplace injury is stated in the Act as "resulting in whole or in part from the negligence" of the railroad employer. 45 U.S.C. § 51.

From adoption of the FELA, its safety purpose and the humanitarian aspect thereof were consistently thwarted by application of traditional common law defenses. This failure to reduce the number of injuries to rail workers and to create a safe place for them to work led to the 1939 amendments of the FELA. Those amendments broadened the scope of the statute, abolished the assumption of risk defense in all

cases, extended the statute of limitations by fifty percent, and criminalized suppression of the voluntary furnishing of information concerning a FELA case. At the same time, the Congress expressly declined to narrow causation by requiring proximate cause as a basis for liability. *See Wilkerson v. McCarthy*, 336 U.S. 53, at 68 (1949) (Douglas, J., concurring (citing H.R. Rep. No. 1386, 60th Cong., 1st Sess., 2 (1908)). By reason of the adoption of a comparative negligence standard in 1908, establishment of a proximate cause standard was unnecessary; the trier of fact as to whether the employee's injury resulted "in whole or in part from the negligence" of both the employee and the employer must consider the extent of the negligence by either or both at the same time in reaching its decision as to each party's percentage of liability. *See Norfolk Southern Ry. Co. v. Sorrell*, 549 U.S. 158, 168 (2007).

Notwithstanding the consistent demand of the railroads to change the standard of causation to proximate cause, the Congress has refused to do so and the courts have applied a relaxed causation standard. *See Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532, 543 (1994); *also see Norfolk Southern Ry. Co. v. Sorrell*, *supra* at 177 (Ginsburg, J., concurring).

By 1970, it had become inescapable that the first safety law applicable to the rail industry, the Safety Appliance Act of March 2, 1893, 27 Stat. 531, currently 45 U.S.C. §§ 20301-20305, and successor safety statutes did not, even with the FELA, sufficiently

protect railroad employees or the public from unsafe railroad operations. The enactment of the Federal Railroad Safety Act of 1970 was the first statutory revision of railroad safety laws and was intended to create the means to build on the FELA safety enhancements in a significant way in the rail industry. The Federal Railroad Administration (FRA), which had been created by the Department of Transportation Act of 1966, was assigned, among other things, certain enforcement powers. However, by 1974, some in Congress were dissatisfied with the interim results. Hearings were held, and the response was adoption of Section 203 of the Rail Safety Improvement Act of 1974.

The congressional dissatisfaction with the FRA became more pronounced in 1975, when the House Committee on Intrastate and Foreign Commerce stated: "The Committee feels that these statistics [from a consulting firm contracted by the FRA to study its rail safety enforcement and inspection programs] are telling that the Federal Railroad Administration (FRA) is not doing its job adequately." This lack of success on the part of the agency led Congress to enact several amendments to put some teeth into FRA's enforcement activities. Nevertheless, enforcement by the FRA has been largely ineffectual in the four decades following 1970. In turn, the failure to meet the expectations for the safety laws resulted in Congress broadening the FELA again, this time to deem FRA safety regulations – as well as rail safety regulations in states that participate jointly

with FRA in rail safety investigative and surveillance activities – to be statutes in the application of FELA's Section 3 bar on contributory negligence when a carrier has violated a statute enacted for the safety of employees (P.L. 103-272, § 4(i), July 5, 1994, 108 Stat. 1365), and led to passage of the Rail Safety Improvement Act of 2008, P.L. 110-432.

Although it may be asserted that these efforts have resulted in a reduction of railroad accidents and a drop in FELA claims, and, therefore, public policy permits a relaxation in applying FELA with a proximate cause standard and the enforcement of the FRA's regulations without further changes or more aggressively, a comparison of the available data shows otherwise. Moreover, the FRA has primarily promulgated only minimum safety standards. *See, e.g.*, 49 C.F.R. §§ 213.1, 214.1(b), 215.1, 218.21, 218.31, 219.1(b), 220.1, 221.1, 223.1, 229.1, 230.1, 232.1(a), 234.1, 236.0, 238.1(b), 239.1(b), and 240.1(b).

In sum, the FELA continues to be the cornerstone of the broad, remedial scheme to promote rail safety that Congress has fashioned and desires enforced. 49 U.S.C. § 103(c). This Court has construed the FELA's "in whole or in part" standard as "simple and direct" and has held that consideration "of its meaning by the introduction of dialectical subtleties can serve no useful interpretive purpose." *Coray v. Southern Pacific Co.*, 335 U.S. 520, 524 (1949). To make it more difficult for an injured or deceased railroad employee to establish negligence by the introduction of a proximate cause standard in the FELA

would cause safety to suffer. Railroads could relax safety protections except for the minimum standards promulgated by the Department of Transportation and the Department of Labor's Occupational Safety and Health Administration. This, in turn, would increase a railroad's willingness to cut corners and endanger lives. The FELA remains the most effective incentive for railroads to maintain a safe workplace. A change from the relaxed causation standard to proximate causation will eliminate that incentive. The legislative history of FELA, more than 70 years of congressional consideration of proposals to either introduce a proximate cause standard or repeal the Act in its entirety, and the fact and data driven recent actions by the Congress to broaden remedial protection for railroad workers who are injured on the job all militate most strongly against the Petitioner's arguments requesting the Court to legislate such change.

ARGUMENT

I. THE FEDERAL EMPLOYERS' LIABILITY ACT FULFILLS AND CONTINUES TO ENHANCE THE SAFETY PURPOSE OF THE SCHEME DEVELOPED BY CONGRESS TO REDUCE THE NUMBER AND SEVERITY OF EMPLOYMENT ACCIDENTS TO RAIL WORKERS.

A. The FELA Was the Congressional Response to Unique Railroad Industry Hazards.

The hazards facing railroad workers at the time of the FELA's enactment in 1908 is well documented. Citing the Second Annual Report on the Statistics of Railways in the United States to the Interstate Commerce Commission for the Year Ending June 30, 1889 (Washington, D.C. 1890), at 36-38, one scholar has stated:

> "When the newly established Interstate Commerce Commission (ICC) released the first national report of railroad accident statistics in 1889, railroad companies revealed that one out of every 375 employees had been killed in the previous year. One out of 35 had been injured. Running trade members faced even greater risks. Nationally, one out of 117 men employed in the running trades had been killed. One out of every 12 trainmen had been injured on the job during the previous year."

Williams-Searle, John, "Risk, Disability, and Citizenship: U.S. Railroaders and the Federal Employers'

Liability Act," DISABILITY STUDIES QUARTERLY, Vol. 28, No. 3 (2008), http://www.dsq-sds.org/article/view/113/113. This carnage was so severe that in 1892 Edward A. Moseley, secretary of the Interstate Commerce Commission (ICC), found it "appalling . . . that more of the grand army of railway men of this country were cut and bruised and maimed and mangled last year than all the Union wounded and missing on the bloody field of Gettysburg." *Id.*, citing RAILROAD TRAINMEN'S JOURNAL 10 (Nov. 1893) at 938.

Passage of the Safety Appliance Act (Mar. 2, 1893, 27 Stat. 531), which made air brakes and automatic couplers mandatory on all trains in the United States, only made a minuscule reduction in the number of casualties. As another author reports:

> "By the turn of the twentieth century, work related accidents killed one in three hundred railroad employees each year and one in fifty was injured in an accident. In 1908 alone, 281,645 employees were injured at work, and some 12,000 killed."

Witt, John Fabian, "Federal Employers' Liability Act (1908)," Major Acts of Congress, 2004, http://www.encyclopedia.com

As conceded by *amicus* Association of American Railroads (AAR) in its brief in support of grant of the petition, the FELA was enacted "in response to what was perceived as an intolerably high injury rate in the railroad industry," referring to the ICC, Statistics of Railways in the United States 1908. AAR Brief on

Petition at 13 & n.6. The dire situation had been acknowledged in the preceding decade, when "President Harrison had admonished Congress to act to protect rail employees, a plea which resulted in enactment of the Safety Appliance Act, c.196, 27 Stat. 531 (1893), the first federal railroad safety legislation. *See Johnson v. Southern Pac. Co.*, 196 U.S. 1, 19 (1904)." *Id.* As previously noted, this law was a modest approach which had minuscule effect.

With this manslaughter taking place, the Congress was forced to directly address the travesty and in 1906 passed the Employers' Liability Act. The legislation, as written, was found unconstitutional because its exercise was beyond the power vested in the federal government by the Commerce Clause. *See The Employers' Liability Cases*, 207 U.S. 463 (1908). Congress corrected the infirmities in the law almost immediately thereafter by enacting the FELA in 1908, which passed constitutional muster in the *Second Employers' Liability Cases*, 223 U.S. 1 (1912).

Clearly, the FELA was adopted in 1908 as the primary safety law for railroad workers. *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 329-30 (1958). In view of the safety purpose of the Act, this Court has recognized that the statute imposes a continuing and non-delegable duty on railroads to provide their employees with a reasonably safe place to work. *Bailey v. Vermont Central Ry. Co.*, 319 U.S. 350, 353 (1943). FELA is the cornerstone of the congressional scheme to reduce railroad accidents and injuries. Then, as now, the standard for causation

to recover for an injury in the railroad workplace is stated in the Act as "resulting in whole or in part from the negligence" of the railroad employer. 45 U.S.C. § 51. This statutory scheme, based on FELA and the Safety Appliance Act, was supplemented by empowering the ICC to issue rules, orders and standards to address safety and risk issues.[2]

However, the humanitarian and remedial purposes of the FELA, which provided strength to the overall safety scheme, were consistently thwarted by application of traditional common law defenses, which led to the 1939 amendment of the FELA. Those amendments covered more rail workers, abolished the defense of assumption of risk in all cases, extended the statute of limitations from two years to three years, criminalized the suppression of the voluntary furnishing of information concerning a FELA claim and reaffirmed the comparative negligence standard. Thus, the amended FELA was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations. Not all of these costs were imposed, for the Act did not make the employer an insurer. The liability which it imposed was the liability for negligence, as this Court has held on innumerable occasions.[3] During the

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[2] The ICC maintained bureaus and/or divisions having jurisdiction over: safety, generally; safety appliances; locomotive inspection, including boiler inspection; accidents; hours of service; and several other aspects of rail safety. *See*, http://www.archives.gov/research/guide-fed-records/groups/399.html.

[3] The brief of *amicus curiae* AAR goes to great lengths to argue that the FELA's relaxed causation standard improperly

(Continued on following page)

first decades of FELA's existence, judges had permitted numerous defenses so that the employer was often effectively insulated from liability even though it was responsible for the unsafe conditions of work. The purpose of the Act was to change that strict rule of liability, to lift from the employees the "prodigious burden" of personal injuries which that system had placed upon them, and to relieve workers "who by the exigencies and necessities of life are bound to labor" from the risks and hazards that could be avoided or lessened "by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employee does his work." *Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949) (Douglas, J., concurring) (citing H.R. Rep. No. 1386, 60th Cong., 1st Sess., 2 (1908)).

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transforms it into "a no-fault type" statute. *See* AAR Brief at pp. 5-7, 15-21. More than a century of administration of the FELA by the courts plainly belies this claim, as the various reporters are well populated with opinions denying recovery to injured railroad workers because the FELA's relaxed causation standard under assault here was not met in those cases. *See, e.g., Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994). Because AAR-member railroads continue to argue in all venues – and not without success – that particular FELA claims should be denied as a matter of law because railroads are not insurers under the liability-based statute, AAR's disingenuous argument that any standard below proximate cause creates a hybrid FELA/no-fault system should be vigorously rejected.

B. Congress Has Consistently Expressed the Long-Standing Intent to Afford Railroad Workers Injured on the Job Broad Statutory Protections Under the Scheme Based Upon FELA Safety Laws.

As noted at page 4, *supra*, the FELA of 1908 adopted a causation standard of injury to a railroad worker engaged in interstate commerce, or in the case of a fatality to the estate of a railroad worker, "resulting in whole or in part from the negligence of a common carrier" by railroad who employs such worker. 45 U.S.C. § 51. Obviously, this standard is not the common law "proximate cause" standard. That Congress intended a relaxed standard, and not the common law standard for causation, was reaffirmed when Section 54 of Title 45, U.S. Code, was retained in 1939 as it was written in 1908 to include those exact words, after Congress twice considered, and rejected, raising the standard to proximate cause. *Black's Law Dictionary* 1391 (4th ed. 1951) defines "proximate cause" in the following terms:

> "The last negligent act contributory to an injury, without which such injury would not have resulted. *Estep v. Price*, 93 W. Va. 81, 115 S.E. 861, 863. The dominant cause. *Ballagh v. Interstate Business Men's Acc. Ass'n*, 176 Iowa 110, 155 N.W. 241, 244, L.R.A. 197A, 1050. The moving or producing cause. *Eberhardt v. Glasco Mut. Tel. Ass'n*, 91 Kan 163, 139 P. 416, 417. . . . The efficient cause; the one that necessarily sets the other

causes in operation. *Baltimore & O. R. Co. v. Ranier*, 84 Ind. App. 542, 149 N. E. 361, 364."

The statutory language on its face is clearly distinguishable from proximate cause, which is used in the sense of the main or direct cause. The latter's interpretation and application is totally removed from Congress' intent to provide a relaxed comparative negligence standard in 1908, which was retained as such in 1939 by Congress, and later reaffirming it by rejecting amendments to replace that standard with proximate cause. Indeed, it is antithetical to the very structure of FELA to conclude that congressional intent was to impose a proximate cause standard, when liability is determined under the FELA by explicitly recognizing multiple causes, with the trier of fact determining the percentage of fault to be assigned each actor.

The railroad industry has made continuous, strident efforts to limit or negate the FELA's intended statutory protections for railroad workers injured on the job since its adoption. First, as noted at 11, *supra*, the initial Employers' Liability Act was successfully challenged on constitutional grounds. Then, when the FELA was found to be within the power of Congress to regulate interstate commerce, the railroads undermined the law by various artifices, forcing Congress to amend the statute, including prescribing civil and criminal penalties for suppressing voluntary information concerning a FELA claim. These efforts were redoubled when the proposed amendments of 1939 were revealed. In amending the FELA,

the Congress declined to include proximate cause as the basis for liability. An amendment proposed that year would have revised Section 4 to read: "In any action brought against any common carrier . . . such employee shall not be held to have assumed the risks of his employment in any case where . . . the negligence of such common carrier, its officers, agents, or employees, *proximately contributed* to the injury or death of such employees." *See* 42 Cong. Rec. 10,710 (1939) (emphasis added). This followed up on a similar amendment proposed the preceding year. *See* H.R. Rep. No. 75-2153, at 1 (1938). However, those amendments were rejected by Congress, and Section 4, 45 U.S.C. § 54, following the 1939 amendments – and to the present day – states that "[i]n any action brought against any common carrier . . . such employee shall not be held to have assumed the risks of his employment in any case where such injury or death *resulted in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier. . . ." (emphasis supplied).

Even though these attempts to introduce a proximate cause standard into FELA preceded the standard clearly articulated in *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957) – the precedent that is under direct attack here – Congress must be presumed as being aware of this Court's interpretation of the statute. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). In fact, not only has Congress not acted to reverse *Rogers*, it has rejected repeated attempts by the industry to repeal the FELA, each

time effectively approving the holding in *Rogers*. *See, e.g.*, *Federal Employers' Liability Act: Hearing before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 101st Cong., 1st Sess. (1989); *Railroad Safety Programs: Hearings Before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 102nd Cong., 1st Sess., 178-80 (1991); *The Impact of Railroad Injury, Accident and Discipline Policies on the Safety of American Railroads: Hearing Before the House Committee on Transportation and Infrastructure*, 110th Cong., 1st Sess., 238, 243-46 (Oct. 25, 2007) (Statement of Edward Hamberger, President and Chief Executive Officer, Association of American Railroads).

Petitioner perfunctorily asserts that congressional inaction on amendments to incorporate a proximate cause standard in the FELA does not support the Seventh Circuit's decision in this matter. *See* Petitioner's Brief at 51-52. However, as shown above, Congress has been anything but inactive on questions of rail safety and what rights and remedies should be available to railroad workers who are injured during the course of their employment. Indeed, in recent years the Congress has again *broadened* the available remedies in order to counter the industry's proven harassment and intimidation of injured railroad

workers.[4] In enacting the *Implementing Recommendations of The 9/11 Commission Act of 2007*, Congress made it unlawful for a "railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, [to] discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done . . . to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee." P.L. 110-53 at §1521, 121 Stat. 444-445 (Aug. 3, 2007) (codified at 49 U.S.C. § 20109(a)(4)).

Following the above hearing in 2007, Congress broadened even further the legal protections afforded to injured railroad workers. First, it prohibited railroads from "deny[ing], delay[ing], or interfer[ing] with the medical or first aid treatment of an employee who is injured during the course of employment" and required that, upon request, the railroad must "promptly arrange to have the injured employee transported to the nearest hospital where the employee can

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[4] In this regard, Petitioner's citation of the Racketeer Influenced and Corrupt Organizations Act (RICO) as a model for liberally construing the FELA as a remedial statute is repugnant and shameful, but typical of the industry's attitude toward its workforce and their health and safety.

receive safe and appropriate medical care." P.L. 110-432 at § 419, 122 Stat. 4892 (Oct. 16, 2008) (codified at 49 U.S.C. § 20109(c)(1)). Second, Congress made it unlawful for a railroad to "discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician," and went on to define "the term 'discipline' [as] mean[ing] to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of a reprimand on an employee's record." *Id.*, at 122 Stat. 4892-93 (codified at 49 U.S.C. § 20109(c)(2)).[5]

These newly broadened protections already have resulted in numerous findings by the Occupational Safety and Health Administration (OSHA) – the federal agency charged with enforcing 49 U.S.C. § 20109 – that railroads continue to violate these laws. *See, e.g., Araujo v. New Jersey Transit Corp.*, Case No. 2-2140-08-013 (Apr. 6, 2010) (railroad ordered to pay $569,586.45 in damages, restore all fringe benefits lost, and expunge employee's discipline record); *Anderson v. National Railroad Passenger Corp.*, Case No. 2009-FRS-00003 (Aug. 26, 2010) (railroad ordered to pay $162,266.67 in damages, plus "reasonable attorney's fees and costs, including expert

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[5] These new legal rights also are intended to address the fact that "rail carriers joined together and challenged" state laws providing similar rights in Illinois and Minnesota, which the railroads succeeded in having struck down on the basis of federal preemption. *See* H.R. Rep. No. 110-84 at xiii.

witness fees," and expunge employee's discipline record); *Helm v. Burlington Northern and Santa Fe Railway Co.*, Case No. 7-5880-10-044 (Dec. 3, 2010) (railroad ordered to pay $95,096.30 in damages and to expunge employee's discipline record).

Under these contemporary circumstances, it cannot be seriously disputed that the intent of Congress is anything other than to afford broad statutory protections to railroad workers when they are injured on the job. The FELA continues to be the cornerstone of that broad, remedial protection scheme. This Court has construed the FELA's "whole or in part" standard as "simple and direct" and has held that consideration "of its meaning by the introduction of dialectical subtleties can serve no useful interpretive purpose." *Coray v. Southern Pacific Co.*, 335 U.S. 520, 524 (1949). Moreover, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1982). For over one hundred years, the Congress has given the railroad industry the opportunity to engage in self-regulation in regard to its safety record and has found that the industry has miserably failed to do so. Thus, Congress has had to periodically affirm each action taken by it to reduce accidents and the employment-related injuries and deaths of railroad workers, and take additional steps in its scheme of promoting safety. This Court should not take any step in the interpretation of the FELA to

introduce a new causation standard which assuredly will serve to reduce the safety efficacy of the FELA.

C. Public Policy Considerations Support Continuation of the FELA's Relaxed Causation Standard.

Public policy considerations are as relevant in determining rail safety matters as they are in rail-management labor cases, such as drug use in both juridical and arbitral cases. In this regard, the continuing value and force of the FELA, as well as its judicial construction and application, to act as a powerful incentive to reduce accidents and injuries to the rail worker population is brought into question by the industry's proposed elimination of the relaxed causation standard for liability. However, that ability to do so continues to be fully supported by the past history of FELA and by contemporary casualty data.

In 1996, the General Accounting Office (GAO) published a report detailing its comprehensive study of FELA, which was undertaken at the request of the Chairwoman of the Subcommittee of Railroads of the House Transportation and Infrastructure Committee. *See* GAO/RCED-96-199. GAO reported that, between 1990 and 1994 – a period in which railroad employment declined 9.8% from 296,000 to 267,000 – the number of FELA claims dropped nearly 31%, from 17,398 to 12,025, reflecting a reduction in the workforce. *Id.* at 14.

More recently, a chart included in an October 23, 2007 Briefing Memorandum prepared by the Republican Staff, Oversight and Investigations for the Subcommittee on Railroads, Pipelines and Hazardous Materials for Republican Members of the House of Representatives Committee on Transportation and Infrastructure for use at an October 25, 2007 hearing on the impact or railroad injury, accident, and discipline policies on the safety of America's railroads ("T&I Briefing Memorandum") indicated that the number of non-fatal casualties among railroad workers for the first six months of the year had declined over 40%, from 4,824 in 1998 to 2,877 in 2007. *See* T&I Briefing Memorandum at 2, which may be found at http://republicans.transporation.house.gov/Media/File/110th/Info/FullCommittee/10-25-07–hearing-memo.pdf, accessed Feb. 15, 2011. Furthermore, the number of reported railroad worker injuries per 200,000 hours worked had dropped from 3.69 in 1996 to 2.02 in 2007, a decrease of just under 45%. *Id.* at 3.

Data accumulated by the FRA – the agency charged with oversight of rail safety (49 U.S.C. §1.49(m)) – generally supports the GAO conclusions.[6] However, the FRA statistics also establish that railroad employment continues to be exceptionally hazardous. Despite the decrease in the number of casualties, data regarding fatalities shows a troubling trend.

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[6] The FRA data herein was accessed on January 4, 2011 from the public online database maintained at http://safetydata.fra.dot.gov/officeofsafety/ and covers the period from 1975 through 2009. Full year statistics for 2010 are not yet available.

For example, fatalities constitute a significantly higher percentage of casualties (fatalities plus injuries) at present than during any period covered by FRA's data. In 2008, fatalities comprised nearly 0.52% of all casualties, as compared to less than 0.14% in 1981. Moreover, four of the five highest fatality percentages occurred during the most recent six years for which FRA has full-year data (2004-2009), while four of the five lowest fatality percentages occurred during the first seven years in which FRA kept data (1975-1981). Fatalities for the first ten months of 2010 comprised nearly 0.53% of all casualties; a trend that would make it the highest percentage since the FRA began recording such data in 1975. The average fatality percentage for the period from 1975 through 1981 was 0.18%, while from 2004 through 2009 the average fatality percentage was 0.39%, more than twice as high.

Moreover, the impact of fatalities is disproportionate and is most heavily borne by the operating crafts employed in train and engine service. For the STB employment data used herein, which FRA also uses in compiling its casualty data, *see* http://www.stb.dot.gov/econdata.nsf/dc81d49e325f550a852566210062addf?/openview, accessed Jan. 17, 2011. For FRA's entire reporting period, fatalities to train and engine service employees comprised 54.76% of all fatalities, which is a significantly higher proportion than the number of Class I railroad workers in those crafts expressed as a percentage of all Class I railroad workers. For the past thirteen years for which data

are available, the exorbitant share of fatalities inflicted upon train and engine service employees is as follows:

Year	Pct. of Workforce	Pct. of Fatalities
1997	36.32%	56.76%
1998	38.50%	59.26%
1999	38.68%	67.74%
2000	39.39%	62.50%
2001	39.64%	63.64%
2002	39.45%	45.00%
2003	40.27%	68.42%
2004	42.23%	80.00%
2005	43.29%	72.00%
2006	43.67%	43.75%
2007	43.20%	58.82%
2008	42.49%	61.54%
2009	39.85%	62.50%

Railroad workers in the maintenance of way and structures group is similarly victimized, and in more years than not during this period the percentage of those workers who sustained fatal injuries exceeded that group's proportion of the population of Class I railroad workers. In other words, death on the job continues to be a very real risk for the more than three in five railroad workers classified in these two groups.

Moving beyond the railroad industry, a comparison of fatality rates between FRA data and that published by OSHA underscores the unique hazards inherent in railroad employment. The rates of railroad industry fatal work injuries and national fatal

work injuries for the last four years for which data have been compiled are as follows:[7]

Year	FRA fatality rate	OSHA fatality rate
2006	6.6	4.2
2007	7.0	4.0
2008	10.9	3.7
2009	7.4	3.3

It should be noted that the OSHA data for 2009 are preliminary, and the FRA fatality rate for the first ten months of 2010 was 10.4. Thus, despite the improvements, the incidence of fatal injuries in the railroad industry remains disturbingly higher than in the American workplace as a whole.

Unfortunately, no similar apples to apples comparison can be made regarding workplace injuries. While fatalities cannot go unreported, it is a sad fact that reporting of railroad workplace injuries can be,

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[7] *See* http://www.bls.gov/iif/oshwc/cfoi/cfch0008.pdf at p. 2, accessed Jan. 6, 2011. The rates shown represent fatal work injuries per 100,000 full-time equivalent workers. Each is calculated as an Hours-Based Rate, which equals the number of fatal work injuries divided by the total hours worked by all employees, which quotient is then multiplied by 200,000,000 where 200,000,000 represents the base for 100,000 full-time equivalent workers working 40 hours per week, 50 weeks per year. The total hours worked figures for the OSHA data are for civilians, 16 years of age and older, from the Current Population Survey. Sources: FRA data, *supra* note 6; U.S. Bureau of Labor Statistics; U.S. Department of Labor; Current Population Survey; Census of Fatal Occupational Injuries; U.S. Census Bureau; and U.S. Department of Defense, 2010.

and frequently is, suppressed by rail employers. FRA's regulation governing reporting, classification, and investigation of railroad accidents and incidents requires that railroads adopt and comply with Internal Control Plans intended to minimize, if not eliminate altogether, harassment and intimidation related to the suppression of and retaliation against injury reporting. *See* 49 C.F.R. § 225.33. However, the civil penalties that could be imposed for violation of the anti-harassment and anti-intimidation provisions of FRA's rule are $2,500 per violation and $5,000 per willful violation. *Id.* at App. A. This is a paltry sum when compared to the potential FELA liability a railroad faces when a railroad worker is injured on the job.

Indeed, the aforementioned October 25, 2007 congressional hearing was conducted as a direct result of the failure of FRA's anti-harassment and anti-intimidation regulation. In its Memorandum providing a summary of the subject matter of the hearing, the Oversight and Investigations Majority Staff of the House Committee on Transportation and Infrastructure indicated that it possessed "hundreds of reports from rail employees . . . suggesting that railroad safety management programs sometimes either subtly or overtly intimidate employees from reporting on-the-job injuries." H.R. Rep. No. 110-84, 110th Cong., 1st Sess. (2007), at v. The Memorandum also noted that FRA's regulation, promulgated in 1996, was triggered by a 1989 GAO investigation that "found systematic underreporting and inaccurate reporting of injury and accident data by the railroads

it audited. *Id.* at vi. The GAO investigation disclosed that "FRA investigated *less than two-tenths of one percent* of all accidents and incidents involving railroads" and the summary noted that "in those few instances where violations were found, Federal law allows the FRA to negotiate-down the amount of civil penalties, and this is a common practice." *Id.* (emphasis supplied).

The Memorandum further stated that FRA's Associate Administrator for Safety acknowledged "that supervisory pressure on employees to not report injuries is a significant issue," and that enforcement efforts were lacking because "FRA simply does not have the resources to investigate the extent of the 'harassment' issue." *Id.* at vii. The Memorandum went on to note that an investigation of one Class I railroad by FRA, which had been completed earlier that year, disclosed that the railroad "frequently harasses and intimidates employees and found numerous violations of Federal law." *Id.*

The Memorandum identified several methods used by railroads to chill reporting of injuries, including: targeting injured employees for increased monitoring and testing; supervisors discouraging employees from filing accident reports; supervisors attempting to influence medical care rendered to injured employees in an attempt to either inject doubt into the workplace nexus for the injury or to reduce the medical treatment rendered the worker to a level below which reporting to FRA is not required; using so-called "light duty" programs to subvert the FRA

reporting trigger based on lost work time; discipline-based "availability" policies; and tying supervisors' performance evaluations and bonuses to reduced injury rates. *Id.* at viii-x. The industry uniformly defended its unlawful activities by claiming that FELA's negligence-based standard had created an "adversarial labor-management relationship." *Id.* at xi. As we have shown, the adversarial relationship dates back over a century, which the railroads have relentlessly prosecuted ever since.

Thus, because of rampant harassment and intimidation of railroad workers who attempt to report workplace injuries, which FRA has been unequipped and unable to control, any attempt to correlate railroad injury rates with workplace injury rates generally would be speculative. Nonetheless, there is no evidentiary basis for concluding anything other than that there is a continuing need for the remedial purposes of FELA, whether the risk is one of injury or of death to a railroad worker.

Under the described contemporary circumstances, the legislative history of FELA, more than seventy years of congressional consideration of proposals to either introduce a proximate cause standard or repeal the Act in its entirety, and the fact and data driven recent actions of the Congress to broaden remedial protection for railroad workers who are injured on the job all militate most strongly against Petitioner's arguments that "proximate cause" should replace "resulting in whole or in part" and the relaxed standard devised by the Congress. The complementary tort

system of the FELA was laid by Congress as the cornerstone needed to enforce the railroad safety scheme; in other words, to put some teeth into it. As the Rail Labor Coalition has established from the current situation, this complementary tort system should be retained. FRA is a resource starved agency unable to prevent accidents. The industry itself has been delegated or allowed to assume much of the responsibility to regulate itself and has used that delegation, not to enhance the reduction of accidents and elimination of injuries and death, but to circumvent the process of enforcement. The FELA tort system, as presently constituted, is needed to serve as an independent monitor of industry's activities to insure those activities are taken with promoting safety in mind.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

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CSX TRANSPORTATION, INC.,
Petitioner,

v.

ROBERT MCBRIDE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 10-235

CSX TRANSPORTATION, INC.,
Petitioner,

v.

ROBERT MCBRIDE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and

[1] The parties have consented to the filing of AAR's brief. Letters expressing consent of the parties have been filed with the Clerk of the Court. Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

employ 92 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry, including participation as *amicus curiae* in cases raising significant legal and policy issues.

This case, arising under the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60, presents such an issue. FELA, a federal negligence statute, takes the place of workers' compensation in the railroad industry. FELA presents unique issues and problems for railroads because, as a negligence law, it differs fundamentally from the no-fault compensation systems that cover virtually all other U.S. industries. Each year thousands of FELA claims and lawsuits, like the case below, are asserted against AAR member railroads, to which they devote substantial legal and financial resources: all told, the railroads spend hundreds of millions of dollars annually in the payment and defense of claims brought under FELA. Because FELA litigation is an ongoing event for all major railroads, AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability under FELA.

This Court is reviewing a decision of the Court of Appeals for the Seventh Circuit which erroneously sanctioned the application of a relaxed standard of causation in FELA cases, a ruling that is at odds with the language of the statute, Congressional intent and prior decisions of this Court and other courts. As causation is an element of all FELA actions, this issue is relevant in virtually every FELA lawsuit, and numerous lower court decisions demonstrate that the way in which causation is interpreted can affect the outcome of a case. Thus, this case presents one of the

most significant issues for AAR members that this Court has addressed in many years.

When AAR participates as *amicus curiae* in a FELA case, it brings a broad, industry-wide perspective to the issues before the court. AAR works closely with its member railroads on a host of issues arising under FELA. Thus, AAR is thoroughly familiar with the trends and key issues that confront its members in FELA litigation. As a trade association representing the nation's major railroads, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

STATEMENT OF THE CASE

AAR adopts the Statement of Petitioner.

SUMMARY OF THE ARGUMENT

When FELA was enacted in 1908, it incorporated proximate cause. Though Congress modified some aspects of the common law to facilitate recovery, it did not change the requirement that plaintiffs prove their injury was proximately caused by the defendant's negligence. This requirement has never been subsequently altered by Congress; nor have any prior decisions of this Court called for a different standard. Proximate cause remains the law today in FELA cases.

Though workers' compensation laws, which provide benefits to all employees suffering workplace injuries regardless of fault, now cover the vast majority of employers in the United States, Congress has retained a fault-based system for railroads. As a

fault-based compensation law, under which negligence and causation must be proved, FELA was not meant to guarantee recovery in all cases of workplace injuries. Nonetheless, during the past several decades some lower courts have watered down the causation standard, interpreting FELA in a way that all but guarantees recovery, thereby resembling a no-fault law in key respects. However, in contrast to workers' compensation laws which limit benefits in order to create an incentive for rehabilitation and return to work, FELA permits plaintiffs to recover full, uncapped tort damages. Thus, in jurisdictions that apply a relaxed standard of causation, FELA resembles a hybrid compensation law, which is at odds with prevailing compensation policy.

In 1939, Congress amended FELA to ease the path toward recovery by modifying provisions of the statute that served to prevent injured employees from recovering, either because they could not meet the strict test of interstate commerce or because the employer successfully argued that the employee had assumed the risk inherent in the employment. However, as the record clearly shows, the 1939 amendments did not address the issue of causation, leaving intact the original proximate cause requirement. Cases which suggest otherwise are incorrect.

Proximate cause has long been recognized as an essential element of the law of negligence. It remains a useful and important concept that is a necessary condition for imposing liability for the consequences of wrongful acts. Other federal statutes which permit the recovery of damages and which, like FELA, are derived from common law principles, also incorporate proximate cause. So does admiralty law, which this Court has looked to when interpreting FELA.

Moreover, though FELA has a remedial purpose, that is not a basis for relaxing the proximate cause standard. This Court has long held that except as explicitly abrogated, common law doctrines that prevailed in 1908 serve to guide interpretations of FELA, notwithstanding the statute's remedial purpose.

ARGUMENT

I. CONGRESS INCORPORATED PROXIMATE CAUSE INTO FELA AND UTILIZING A RELAXED CAUSATION STANDARD IMPROPERLY TRANSFORMS FELA INTO A NO-FAULT TYPE STATUTE WHICH IS INCONSISTENT WITH BOTH CONGRESS' INTENT AND THIS COURT'S PRIOR DECISIONS

Petitioner correctly argues that to recover under FELA a plaintiff must prove, among other things, the defendant's negligence was a proximate cause of the plaintiff's injury. Such a requirement, typical of common law negligence claims, was incorporated into FELA when it was enacted, has never been altered, and remains the law today. This Court should reaffirm its numerous earlier decisions holding that proximate cause is the standard of causation under FELA [*see* Pet. Br. at 27-30], and reverse the decision of the Court of Appeals for the Seventh Circuit which held otherwise. *McBride v. CSX Transp., Inc.*, 598 F.3d 388 (2010).[2]

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[2] Indeed, despite "declin[ing] to hold that . . . common-law proximate causation is required to establish liability under FELA," *McBride*, 598 F.3d at 406, the Seventh Circuit offered several cogent reasons why it should have reached the opposite conclusion. The Seventh Circuit acknowledged that (1) "[e]arly

Many lower courts that eschew proximate cause believe that FELA calls for plaintiffs to prevail where the evidence would not support such a result in a common law negligence action.[3] Indeed, in juris-

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FELA cases did not interpret the language 'resulting in whole or in part' as altering the common law requirement of proximate cause" *id.* at 392; (2) those "cases never have been overruled explicitly," *id.* at 393; (3) the U.S. Supreme Court "never has identified proximate causation as among those principles of common law that have been abrogated by the FELA" *id.* at 404; and (4) Justice Souter's concurring opinion in *Norfolk Southern v. Sorrell*, 549 U.S. 158, 172 (2007), critiquing lower court decisions holding proximate cause does not apply, "is not without considerable force," 598 F.3d at 404. The Court further conceded that had the *Sorrell* majority reached the substantive issue, there is some indication that "at least some members of the majority may have been sympathetic to Justice Souter's view." *Id.* at 405.

[3] *E.g.*, *Hausrath v. N.Y. Cent. R.R.*, 401 F.2d 634, 637 (6th Cir. 1968) ("Congress deliberately adopted a negligence standard different from that of the common law."); *Grogg v. CSX Transp., Inc.*, 659 F.Supp.2d 998, 1005 (N.D. Ind. 2009) (relying on "featherweight standard of proof required" under FELA to deny railroad's summary judgment motion despite finding that "the causation evidence . . . is tenuous"); *Gibbs v. Union Pac. R.R.*, 2009 WL 3064956, at *4 (S.D. Ill. 2009) (explaining that while the plaintiff's "first claim might not survive a motion for summary judgment in the traditional tort context, the low negligence threshold of FELA ensures that this count will live to see another day"); *Kansas City Southern Ry. Co. v. Nichols Construction Co.*, 574 F.Supp.2d 590, 594 (E.D. La. 2008) ("FELA plaintiffs can survive dispositive motions by offering evidence which would be insufficient to overcome a similar motion in an ordinary civil case."); *Kreig v. CSX Transp., Inc.*, 2006 WL 2792406, at *2 (W.D. Ky. 2006) (denying railroad's summary judgment motion because the "[p]laintiff's burden is significantly lighter than in an ordinary negligence case"); *Booth v. CSX Transp., Inc.*, 211 S.W.3d 81, 83-84 (Ky. App. 2006) (reversing summary judgment for the railroad because "Congress intended FELA to be a departure from common law

dictions which have adopted a "slight" causation formulation, FELA has come to resemble a no-fault workers' compensation law in key respects, under which the fact of injury in the workplace becomes the basis of liability, albeit while retaining tort damages.[4] This approach has improperly transformed FELA, creating a remedy Congress never intended nor envisioned. Not only have these courts altered the compensation system Congress established for rail workers, they have done so in a way that is unsound as a matter of public policy.

A. Congress Determined That Injured Railroad Employees Should Be Compensated Under A Fault-Based Rather Than No-Fault System

In 1908, during an era when working for a railroad was quite dangerous, Congress fashioned a remedy for rail employees who were hurt on the job.[5] *See*

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principles of liability" and "plaintiffs have a lower standard of proof than plaintiffs in ordinary negligence cases").

[4] In a revealing passage, one court described the state of adjudication under FELA, all but admitting that despite protesting to the contrary, some courts have interpreted FELA to resemble more a workers' compensation law than a tort statute:

> Having accorded the customary, albeit somewhat psittacistic, deference to the non-insurer aspect of the FELA defendant, we will now proceed to discuss that statute as it is. Before doing so, we observe that while the FELA in its terms does not purport to border on a workman's compensation act, certain parallelism may be found.

Heater v. Chesapeake & Ohio Ry. Co., 497 F.2d 1243, 1246 (7th Cir. 1974).

[5] In the year ending June 30, 1907, 4,534 rail workers were killed on the job and 87,644 were injured. Interstate Commerce

Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 542 (1994) (Congress enacted FELA "[c]ognizant of the physical dangers of railroading."); *see also Johnson v. Southern Pac. Co.*, 196 U.S. 1, 19 (1904) (commenting on the dangers facing rail employees before the advent of automatic couplers). When it enacted FELA, Congress adopted what was then the universal compensation model in the United States: the law of negligence. The policy embodied in FELA was straightforward: railroads were to be liable in damages for injuries sustained by their employees in the course of their railroad employment if caused by the negligence of the railroad. 45 U.S.C. § 51.

At the time of FELA's enactment the common law had erected a number of often insurmountable barriers to recovery by workers sustaining job-related injuries. For example, recovery was denied if the worker knew the inherent dangers of a job and assumed those risks by accepting employment. *E.g., Clark v. St. Paul & Sioux City R.R.*, 9 N.W. 581 (Minn. 1881); *Gibson v. Erie Ry. Co.*, 63 N.Y. 449 (1875). In addition, the fellow servant rule, a variant of the assumption of the risk doctrine, held that among the ordinary risks of employment the employee takes upon himself is the "carelessness and negligence of those who are in the same employment," on the theory that "these are perils which the servant is as likely to know, and against which he can as effectually guard, as the master." *Farwell v. Boston & Worcester R.R.*, 4 Metc. 49, 57 (Mass. 1842). Moreover, the prevailing rule in the United States in the nineteenth century was that contributory negligence by the plaintiff completely barred recovery, even if

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Commission, Statistics of Railways in the United States 1908 41, 99 (1909).

the defendant also was at fault. *See Louisville, Nashville & Great Southern R.R. v. Fleming*, 82 Tenn. 128 (Tenn. 1884) ("In England and a majority of the States of the Union, the negligence of the plaintiff which contributes to the injury is held to be an absolute bar to the action.").

With the goal of improving the lot of rail workers, while embracing the concept of common law negligence, FELA expressly modified some of the harsher aspects of nineteenth century common law. In an effort to promote recovery, the assumption of the risk and the fellow servant defenses were eliminated. 45 U.S.C. § 54; *See also Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916).[6] Additionally, in what, for the time, was a significant innovation in tort law, FELA incorporated the doctrine of comparative fault. Rather than completely barring recovery, if the employee's negligence contributed to the injury damages are reduced in proportion to the employee's negligence. 45 U.S.C. § 53. Moreover, no reduction of damages for contributory negligence is made if the injury is caused by violation of a safety statute. *Id.* Finally, FELA included a provision that invalidated any "contract, rule, regulation or device" the purpose of which was to exempt a railroad employer from liability under FELA. 45 U.S.C. § 55; *see Philadelphia, B. & W. R.R.*, 224 U.S. 603 (1912). *See generally* S. Rep. No. 460, at 1-3 (1908), describing how FELA

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[6] Initially, FELA eliminated the assumption of the risk defense only in cases where the railroad violated a safety statute. In 1939, Congress amended FELA to eliminate the assumption of the risk defense in all FELA cases. Act of Aug. 11, 1939, c. 685, §1, 53 Stat. 1404; *see Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 65 (1943).

"revises the law as now administered in the courts in the United States in four important particulars."

However, beyond these explicit alterations to prevailing legal doctrines, Congress adopted the common law, incorporating into FELA the law of negligence as it existed in the early twentieth century, *see Sorrell*, 549 U.S. at 168; *Gottshall*, 512 U.S. at 543-44; *Urie v. Thompson*, 337 U.S. 163, 182 (1949), including the requirement that plaintiffs had to prove the defendant's negligence was the proximate cause of their injury. [*See* Pet. Br. at 21.] As the Report of the House of Representatives accompanying FELA explained, FELA "makes each party responsible for his own negligence and requires each to bear the burden thereof." H.R Rep. No. 1386, at 1 (1908). *See Southern Ry. v. Gray*, 241 U.S. 333, 339 (1916) (The "rights and obligations" under FELA depend upon "applicable principles of common law. . . . Negligence by the railway company is essential to a recovery."). Congress clearly believed that apportioning liability based on traditional concepts of negligence would lead to a fairer and safer rail industry. "What can be more fair than that each party shall suffer the consequences of his own carelessness? . . . By the responsibility imposed, both parties will be induced to the exercise of greater diligence, and as a result the public will travel and property will be transported in greater safety." H.R Rep. No. 1386, at 5-6. Though FELA undoubtedly improved the opportunity for rail employees to be compensated when injured on the job, by enacting a fault-based compensation system, Congress never meant to guarantee recovery of damages for all work-related injuries. *See Phillips v. Penn. R.R.*, 283 F. 381, 382-83 (7th Cir. 1922) (abolition of the fellow servant doctrine "does not mean that interstate carriers must in all events pay

for injuries to their servants"); *see also Gottshall*, 512 U.S. at 543; *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947) (FELA "does not make the employer the insurer of the safety of his employees while they are on duty."); *Terminal R.R. Ass'n v. Howell*, 165 F.2d 135, 138 (8th Cir. 1948) ("There is no absolute duty on the part of the employer to furnish a safe place in which his employee is required to work . . . .").

B. Congress Retained FELA Even as Industry in General Moved to Workers' Compensation Laws, Which Take A Fundamentally Different Approach to Providing Compensation for Workplace Injuries

Even as FELA was being enacted, the philosophy and approach for compensating employees who were injured on the job began to change. Shortly after FELA was enacted, individual states began to adopt no-fault compensation laws, designed to provide insurance-type benefits, as the means of compensating workplace injuries. Most states enacted workers' compensation laws of general application between 1910 and 1920; by 1930 all but four states had enacted a workers' compensation law.[7] Congress followed suit, enacting a no-fault compensation statute for employees of the federal government in 1916, Federal Employees' Compensation Act, 5 U.S.C. § 8101 *et seq.*, and, in 1927, a no-fault compensation statute to cover harbor workers, Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901

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[7] Price V. Fishback and Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States*, 41 J.L. & Econ. 305, 319-20 (1998). In 1948, Mississippi became the last state to adopt a workers' compensation law. *Id.*

et seq. GENERAL ACCOUNTING OFFICE, WORKERS' COMPENSATION: SELECTED COMPARISONS OF FEDERAL AND STATE LAWS 1 (April 1996) ("GAO Report").

Congress recognized that no-fault concepts were replacing negligence law as the prevailing means of addressing workplace injuries, but has nonetheless retained FELA for the railroad industry. Congress did consider moving the railroad industry to a workers' compensation model on a number of occasions. Just a few years after FELA's enactment, a commission established by Congress recommended that FELA be replaced with a system based not on fault but on the fact of injury. REPORT OF COMMISSION TO INVESTIGATE THE MATTER OF EMPLOYERS' LIABILITY AND WORKMEN'S COMPENSATION, S. DOC. NO. 338, 62nd Cong., 2d Sess. 15 (1912). An ensuing effort to replace FELA with a workers' compensation system made it as far as a conference committee, where it ultimately died. Subsequent similar efforts were undertaken during the 1930s which also never reached fruition. Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79, 91 (1992). Though the subject occasionally continues to pique the interest of Congress, *see* GENERAL ACCOUNTING OFFICE, FEDERAL EMPLOYERS' LIABILITY ACT: ISSUES ASSOCIATED WITH CHANGING HOW RAILROAD WORK-RELATED INJURIES ARE COMPENSATED (August 1996), it has left the fault-based FELA intact.[8] For better or worse, Congress has opted to retain a fault-based system for the railroad industry, even as workers' compensation has become firmly established for virtually all other

[8] Bills to replace FELA with the state workers' compensation systems were introduced in both Houses of Congress in 1990 but did not advance. Baker at 80.

industries.[9] *See Gottshall*, 512 U.S. at 543 (FELA "is [not] a workers' compensation statute.").

Workers' compensation takes a fundamentally different perspective than tort laws like FELA. Under a tort system, "only injuries that are due to the wrongful actions of another are actionable . . . and there is no assumption that all injured workers should be compensated." TRANSPORTATION RESEARCH BOARD, SPECIAL REPORT 241: COMPENSATING INJURED RAILROAD WORKERS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT 49 (1994) ("TRB Report"). In contrast, under workers' compensation, the right to compensation is dependent on whether "the employee's injury is caused by the employment," regardless of whether the employer was at fault. *Id.* at 50. Moreover, under workers' compensation, benefits generally are paid only for injuries that affect the ability of the worker to continue working. GAO Report at 2.

Workers' compensation embodies a significant tradeoff: the right of the employee to seek a full recovery is removed in exchange for the certainty of more limited benefits, as there is no need to prove employer fault. PETER M. LENCSIS, WORKERS' COMPENSATION: A REFERENCE AND GUIDE 9 (1998). Under workers' compensation, the amount of compensation for disability generally depends on the worker's previous earnings level, and most acts award a percentage of the injured worker's wages—typically two-thirds—subject to a maximum and minimum. GAO REPORT AT 12-14. Moreover, workers' compensation systems generally do not allow for non-

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[9] Other than the railroad industry, only the maritime industry is covered by a fault-based compensation system. 46 U.S.C. §30104.

economic (pain and suffering) damages, though they typically provide a fixed benefit to account for a permanent partial disability or loss of use of a bodily part or function, in most cases based on a schedule. GAO Report at 25-26.

In contrast, FELA damages are not limited by the caps and other restrictions that typically characterize workers' compensation laws. Instead, juries hearing FELA cases are given wide discretion to make determinations of fact, including the extent of damages suffered. *See e.g., Schirra v. Delaware, L. & W. R.R.*, 103 F.Supp. 812, 823 (M.D. Pa. 1952) ("[T]he jury would be justified in awarding plaintiff a substantial sum of money to fairly compensate him for past and future pain, suffering and inconvenience, and the amount to be awarded is peculiarly within the discretion of the jury, provided it is within reason."); *Seaboard Coast Line R.R. v. Gillis*, 321 So.2d 202, 208 (Ala. 1975) ("The extent of damages under FELA is peculiarly a fact question for the jury."). Jury damage awards will be overturned or subject to remittitur only where jurors have "committed some very gross and palpable error, or have acted under some improper bias, influence or prejudice, or have totally mistaken the rules of law by which damages are to be regulated." *Fiskratti v. Penn. R.R.*, 147 F.Supp. 765, 767 (S.D.N.Y. 1957). Thus, seven figure FELA awards are not uncommon, *e.g., DeBiasio v. Illinois Cent. R.R.*, 52 F.3d 678 (7th Cir. 1995) ($4.2 million award affirmed), *cert. denied*, 516 U.S. 1157 (1996); *Frazier v. Norfolk & Western Ry. Co.*, 996 F.2d 922 (7th Cir. 1993) ($2.3 million award not excessive); *Hensley v. CSX Transp., Inc.*, 278 S.W.3d 282 (Tenn. App. 2008) ($5 million verdict), *rev'd*, 556 U.S. ___, 129 S.Ct. 2139 (2009) (per curium), and a verdict will be deemed excessive only if it

"shock[s the] judicial conscience." *Schneider v. Nat'l R.R. Pass. Corp.*, 987 F.2d 132, 137 (2d Cir. 1993) ($1.75 million verdict, including over $1 million in intangible damages, not excessive). Indeed, AAR members report that FELA verdicts and settlements in excess of $1 million are not uncommon, and AAR is aware of several recent eight-figure verdicts.

C. The Move Towards A No-Fault System Was the Product of Judicial Construction of FELA By Some Lower Courts Rather Than Congressional Action

1. As the workers' compensation systems matured and became an established part of the legal landscape, not unaware of the contrasting policy objectives of FELA and the workers' compensation systems, members of this Court openly debated the implications of maintaining a unique, fault-based compensation law for rail workers. In *Bailey v. Vermont Cent. Ry.*, 319 U.S. 350, 354 (1943), Justice Douglas opined that FELA was "crude, archaic, and expensive as compared with the more modern systems of workmen's compensation." Justice Frankfurter expressed frustration with FELA cases which "derive largely from the outmoded concept of 'negligence' as a working principle for the adjustment of injuries inevitable under the technological circumstances of modern industry." *Wilkerson v. McCarthy*, 336 U.S. 53, 65 (1949) (Frankfurter, J., concurring). Noting that "[t]his cruel and wasteful mode of dealing with industrial injuries has long been displaced in industry generally by the insurance principle that underlies workmen's compensation laws," he nonetheless reminded his colleagues of "the duty of courts to enforce the Federal Employers'

Liability Act, however outmoded and unjust in operation it may be." *Id.* at 65-66.[10]

Indeed, this Court has never construed FELA to be anything but a negligence statute; nor has it ever abrogated proximate cause. [*See* Pet. Br. at 34-42] However, as petitioner explains [*see* Pet. Br. at 33-34], some lower courts have viewed this Court's decision in *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500 (1957) as countenancing a departure from proximate cause, and as a result have effectively blurred the conceptual differences between FELA and workers' compensation, ascribing to Congress an intention that it has never manifested. *See e.g.*, *McBride*, 598 F.3d at 395 (A "new conception of proximate cause 'crystallized' in *Rogers*"); *Richards v. Consolidated Rail Corp.*, 330 F.3d 428, 433 (6th Cir.) (*Rogers* "announced a relaxed test for establishing causation in FELA cases."), *cert. denied*, 540 U.S. 1096 (2003); *Summers v. Missouri Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997) ("During the first half of this century, it was customary for courts to analyze liability under the FELA in terms of proximate causation," but *Rogers* "definitively abandoned this approach."); *Magelky v. BNSF Ry. Co.*, 579 F.Supp.2d 1299, 1305 (D.N.D. 2008) ("FELA's most distinctive departure from the common law is in the area of causation. . . . To impose liability on the defendant,

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[10] Justice Frankfurter's primary concern with this Court's FELA jurisprudence was over what he perceived as the Court's overuse of its discretion to review FELA cases denying recovery in order to weigh in on sufficiency of the evidence issues. "Despite the mounting burden of the Court's business, this is the thirteenth occasion in which a petition for certiorari has been granted during the past decade to review a judgment denying recovery under the Federal Employers' Liability Act in a case turning solely on jury issues." 336 U.S. at 67.

the negligence need not be the proximate cause of the injury."). These courts "have effectively reduced the standards of proof required to demonstrate negligence on the part of the employer" in FELA cases. TRB Report at 2. Of course, not all courts have so succumbed, as a number of lower courts continue to enforce FELA as it was intended, including requiring that plaintiffs prove proximate cause. *E.g.*, *CSX Transp., Inc. v. Miller*, 46 So.3d 450 (Ala. 2010); *Raab v. Utah Ry.*, 221 P.3d 219 (Utah 2009); *Snipes v. Chicago, Cent. & Pac. R.R.*, 484 N.W.2d 162 (Iowa 1992); *Marazzato v. Burlington N. R.R.*, 817 P.2d 672 (Mont. 1991).

2. Courts that read *Rogers* as eliminating the element of proximate cause have taken an improperly expansive view of the right of FELA plaintiffs to recover. For example, in *Richards*, the plaintiff was the conductor on a train which experienced an unexpected application of the air brake system. This caused the train to stop, safely, after which the plaintiff alighted, again without incident. He was injured later when he lost his footing and slipped on ballast while walking alongside the train to inspect it. The plaintiff's theory was that the train stop was caused by a defective valve in the brake system, and but for that defect he would not have been walking alongside the train at that time. It was not alleged that any negligence by the railroad directly caused him to slip.

In *Norfolk Southern Ry. Co. v. Schumpert*, 608 S.E.2d 236 (Ga. App. 2004), *cert. denied*, 546 U.S. 1025 (2005), a missing pin resulted in a knuckle (part of a train's coupling system) falling to the ground without causing any harm. Subsequently, the plaintiff injured his back as he lifted the knuckle while in

the process of replacing it. He claimed his injury was caused in part by another employee's negligent failure to notice the pin was missing—which resulted in the knuckle being on the ground—even though he admitted that lifting a knuckle, the act which directly caused the injury, was a routine task which he had performed many times in the past. *Id.* at 238.

In both *Richards*, 330 F.3d at 433, and *Schumpart*, 608 S.E.2d at 239 (which relied heavily on *Richards*), the court permitted recovery, applying a "relaxed" standard of causation allegedly mandated by the *Rogers* decision, an unlikely outcome in courts that have more faithfully enforced FELA's proximate causation standard. *See Phillips*, 283 F. at 382 (affirming defense verdict, finding that a defective component "was merely the occasion, and not the proximate cause, of the accident"). Surely the plaintiffs in *Richards* and *Schumpert* both would have received benefits under a workers' compensation system, as the injuries in both cases were job-related; however, it is a far stretch to argue those injuries were proximately caused by employer negligence. Indeed, as a matter of public policy, paying compensation, without the need for "years of unedifying litigation," *Stone v. N.Y. Cent. & St. L. R.R.*, 344 U.S. 407, 411 (1953) (Frankfurter, J., dissenting), may have been preferable.[11] But Congress has not chosen that course for railroad workers.

3. There are important reasons for the differences between FELA and workers' compensation, and easing the plaintiff's path to recovery through incor-

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[11] Schumpert's case finally concluded over six years after he was injured when this Court denied certiorari. 546 U.S. 1025 (2005). Richards' case concluded four years after he was injured, also with a denial of certiorari. 540 U.S. 1096 (2005).

poration of no-fault concepts into FELA not only is improper as a legal matter, it undermines the goals of both systems. In a traditional negligence action, the right to uncapped damages is balanced by the rule that recovery of damages is conditioned on proving the defendant's fault. In contrast, under workers' compensation all those suffering work-related injuries are assured of benefits to sustain them through the period of disability, but with limitations designed to promote a primary objective of workers' compensation, rehabilitation and return to gainful employment. GAO Report at 29. Limiting workers' compensation wage loss benefits is consistent with the widely accepted view that if compensation exceeds, matches, or even approaches the employee's entire wage loss there will be little incentive to seek rehabilitation and to return to work promptly. *Id.* at 23 ("If workers' compensation benefits replace too much after-tax income, there are disincentives to return to work following recovery from a job-related injury.").[12]

No-fault compensation systems only achieve their goal of promoting prompt return to the job if they are characterized by reasonable limitations on benefits. Construing FELA, with its potential for full tort damages, to all but guarantee a recovery surely does not achieve that goal. Under FELA, the greater the

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[12] *See also* John Burton, *Disabled Workers' Compensation Programs: Providing Incentives for Rehabilitation and Reemployment*, 8 JOHN BURTON'S WORKERS' COMPENSATION MONITOR (No.4) 6 (1995) ("Most studies find that higher workers' compensation benefits lead to more workers' compensation claims and to longer duration of benefits. . . . [H]igher benefits result in more workers missing work for longer spells of time, which may conflict with the objective of rehabilitation.").

loss the plaintiff can show, the larger the potential damages award. This often creates an incentive for FELA plaintiffs to allege they are permanently disabled from working while their claim is being adjudicated, rather than returning to the job or undergoing rehabilitation. In some cases, once the litigation is concluded—particularly if the award is less than anticipated, or is quickly dissipated (attorneys' fees and litigation expense come off the top)—the same worker may claim to have recovered completely from the disability and seek to return to employment with the railroad. *See e.g., Lewandowski v. Nat'l R.R. Pass. Corp.*, 882 F.2d 815, 817 (3d Cir. 1989) (plaintiff's attorney "hammered home on the seriousness of the injury and his permanent inability to return to Amtrak" only to have plaintiff seek "to return to work" just four days after the end of the trial at which he was awarded damages).[13]

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[13] *See also Morawa v. Consolidated Rail Corp.*, 819 F.2d 289 (6th Cir. 1987) (position set forth in plaintiff's trial brief, which "asserted that he was disabled from the only type of employment for which he was suited and requested damages for the loss of his ability to earn a living from the time of his injury until his normal retirement at age 70," held to be "clearly inconsistent with" his current position "that he is able to return to work"); *Jones v. Cent. of Georgia Ry. Co.*, 331 F.2d 649, 650 (5th Cir. 1964) (plaintiff "alleged that he would be unable in the future to perform railroad work as a switchman or to perform any other type of manual work" only to seek to return to his former job three years later); *Scarano v.Cent. R.R. of New Jersey*, 203 F.2d 510, 511 (3d Cir. 1953) (plaintiff's witness "testified that plaintiff was 'totally disabled' and that his 'condition will become progressively worse should he attempt' any work involving 'the normal range of use of the back that is usually required in any physical effort,'" but plaintiff nonetheless sought to return to his job less than a month after the railroad paid him a settlement reached during the post-trial

Rather than being interpreted as a hybrid system between tort and compensation it was never meant to be, FELA must be interpreted in accordance with Congress' intent. Plaintiffs are entitled to full compensatory damages, but only in cases where they can prove all the elements of a common law negligence case, including that their injury was proximately caused by the defendant's negligence. Watering down that requirement in the context of a system that offers full tort damages simply is inconsistent with prevailing compensation theory. At the same time, maintaining the opportunity for a full tort recovery while relaxing the requirement that proximate cause, as an element of negligence, must be properly proved does not meet the goal of fairness as between employer and employee that Congress sought to achieve in FELA. *See* H.R. No. 1386, at 5 ("What can be more fair than that each party shall suffer the consequences of his own carelessness?").

II. THE PROXIMATE CAUSE STANDARD WHICH CONGRESS INCORPORATED INTO FELA WAS LEFT INTACT BY THE 1939 AMENDMENTS

The Seventh Circuit suggested that amendments to FELA enacted in 1939 called for a more expansive view of the common law requirements that this Court had applied in earlier cases. *See McBride*, 598 F.3d at 395 (quoting Justice Douglas' observation that judicial interpretations in the "spirit" of the 1939 amendments had led to a "gradual liberalization" of FELA, with courts eschewing the "narrow technical

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motion phase). Typically, these efforts are foreclosed by judicial estoppel, leaving the former plaintiff with neither a job nor financial security.

approach of earlier years").[14] To the contrary, however, the 1939 amendments to FELA—enacted primarily to remove two specific obstacles to recovery by plaintiffs—did not purport to address, let alone modify, the standard of causation.

Though Congress never replaced FELA with a no-fault system under which rail workers would be guaranteed benefits if injured on the job, it did eventually take action to address specific aspects of FELA which were impeding the ability of injured workers to recover. In 1939, Congress amended FELA to ease the path toward recovery by modifying provisions of the statute that served to prevent some injured employees from recovering, either because they could not meet the strict test of interstate commerce or because the employer successfully argued that the employee had assumed the risk inherent in the employment. Prior to 1939, in order to recover, "the employee, at the time of the injury," had to be "engaged in interstate transportation, or in work so closely related to it as to be practically a part of it." *Shanks v. Delaware, Lackwanna & Western R.R.*, 239 U.S. 556, 558 (1916). In many cases, this enabled defendants to argue that the plaintiff did not come within the scope of FELA's protection. In addition, employer assertion of the assumption of the risk defense, which initially remained intact in other than safety law violation cases, often undermined the

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[14] *See also Richards*, 330 F.3d at 434 ("The *Rogers* Court adopted this relaxed standard in order to effectuate Congress' intent when it amended FELA in 1939."); *Morrison v. N.Y. Cent. R.R.*, 361 F.2d 319 (6th Cir. 1966) (stating that a charge to the jury on causation was consistent with the 1939 amendments to FELA).

comparative fault feature of FELA. *See Tiller*, 318 U.S. at 63-64.

Adding a provision to section 1 of FELA, the 1939 amendments expanded the scope of FELA's coverage so that workers would no longer have to prove they were engaged directly in interstate commerce at the time they were injured. Act of Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404; *see* S. Rep. No. 661, at 2-3 (1939); *see also Southern Pac. Co. v. Gileo*, 351 U.S. 493 (1956); *Reed v. Pennsylvania R.R.*, 351 U.S. 502 (1956).[15] In addition, the 1939 amendments eliminated the defense of assumption of the risk in all cases. Act of Aug. 11, 1939, c. 685, § 1. The 1939 amendments also increased the statute of limitations under FELA from two to three years, *id.* at § 2, and prohibited railroads from establishing and enforcing rules which penalized employees for giving information concerning an accident to the injured person or his representative. *Id.* at § 3.

Tellingly, during the debate over the 1939 amendments a railroad employees' representative made it clear that in his view Congress had not eliminated the need for employees to prove proximate cause when it enacted FELA in 1908, nor did he urge Congress to do so in 1939. In testimony before the House of Representatives, the General Counsel of the Brotherhood of Railroad Trainmen commented that it

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[15] This amendment added the following language:

> Any employee of a carrier, any part of whose duties as such employee shall be in furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

was unnecessary to add the word "proximately" to a provision of the Act, explaining that such language would be "pure surplusage, because unless the negligence proximately caused the injury there can be no recovery."[16]

Congress incorporated common law proximate cause into FELA in 1908. That standard has not evolved, and there is no basis for suggesting that Congress or this Court intended that rail employees would have a lesser burden of proving causation 50 or 100 years after FELA was enacted than they had at the time of enactment.

III. PROXIMATE CAUSE REMAINS AN IMPORTANT AND VIABLE LEGAL CONCEPT WHICH CONTINUES TO APPLY TO BOTH FELA AND OTHER FEDERAL STATUTES

Proximate cause has long been recognized as an essential element of the law of negligence. "There is an underlying principle applicable to all cases of negligence, ... That is that the negligence proved against the defendant must, in order to justify recovery, be the direct or proximate cause of the injury, directly or proximately contributing to its result." *Florida Cent. & Peninsular R.R. v. Williams*, 20 So. 558, 563 (1896). Consistent with FELA's replacement of the traditional contributory negligence rule with a comparative negligence scheme (*supra* at p. 9), employer negligence need not be the sole proximate cause, but must be a proximate cause, of the injury.

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[16] *Hearings on H.R. 4988 and H.R. 4989 Before the Senate Comm. on the Judiciary*, 76th Cong., 1st Sess. 5 (1939) (statement of Tom J. McGrath, General Counsel, Brotherhood of Railroad Trainmen).

Funseth v. Great Northern Ry. Co., 399 F.2d 918, 920 (9th Cir. 1968) (approving jury instruction defining proximate cause as "a cause which in a direct, unbroken sequence produces the injury").

Not only has this Court held on numerous occasions that proximate cause applies in FELA cases [*see* Pet. Br. at 27-30], it has described that standard as requiring a degree of directness between a negligent act and the harm caused. In *Davis v. Wolfe*, 263 U.S. 239 (1923), this Court explained that "on the one hand, an employee cannot recover" if the employer's negligence or failure to comply with a safety statute

> is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him.

Id. at 243. Twenty years later, this Court described the "proximate cause" standard as requiring a finding "that the injury was the natural and probable consequence of the negligence or wrongful act," adding that "[e]vents too remote to require reasonable prevision need not be anticipated." *Brady v. Southern Ry. Co.*, 320 U.S. 476, 483 (1943).

The requirement that there be a direct relationship between negligent conduct and the harm is not a technicality of a bygone era. Rather, proximate cause remains a useful and important concept that is a necessary condition for imposing liability for the consequences of wrongful acts. Other federal statutes which permit the recovery of damages and which,

like FELA, are derived from common law principles, incorporate proximate cause. This is so even where the statutory language can be broadly read and does not specifically refer to proximate cause.

For example, the federal antitrust laws, enacted during the same general time period as FELA, require a showing that the defendant's anticompetitive conduct proximately caused the plaintiff's harm. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983). Similarly, proximate cause is an element of securities fraud and RICO claims. *Dura Pharm., Inc. v.* Broudo, 544 U.S. 336 (2005); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992); *see also Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) ("When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries.").

This Court also has held that proximate causation, and the related superseding cause doctrine, applies in admiralty cases. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830 (1996). Like FELA, admiralty adopts comparative fault principles, and this Court found proximate cause to be consistent with admiralty law's comparative negligence scheme. That suits in admiralty require a showing of proximate cause is particularly relevant to FELA, as this Court has looked to admiralty in determining the applicable principles in FELA cases. *See Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 163 (2003) (citing the fact that joint and several liability was the traditional rule in admiralty as support for holding that FELA incorporates the doctrine of joint and several liability).

When FELA was enacted in 1908, Congress clearly intended to establish a remedial system to promote recovery. That is precisely why Congress chose explicitly to modify several of the existing common law doctrines that impeded recovery. But this Court has made it clear on more than one occasion that FELA's remedial purpose does not necessarily call for elimination of common law limitations on recovery unless there is a statutory basis for doing so. *See Sorrell*, 549 U.S. at 171 ("It does not follow, however, that this remedial purpose requires us to interpret every uncertainty in the Act in favor of employees.").

For example, in *Gottshall*, this Court rejected the Third Circuit's decision to disregard common law limitations on recovery for negligent infliction of emotional distress in order to promote FELA's preference for a liberal recovery. Instead, the Court held that FELA requires application of the common law zone of danger test, a test which ultimately resulted in both plaintiffs' claims being rejected. In *Metro North Comm. R.R. v. Buckley*, 521 U.S. 424 (1997), consistent with the policy considerations underlying the common law limitations on emotional distress claims, this Court denied recovery for negligent infliction of emotional distress to an asymptomatic plaintiff who was exposed to asbestos, rejecting plaintiff's argument that the "'humanitarian' nature of the FELA warrants" recovery. *Id.* at 438. Earlier, in *Monessen Southwestern R.R. v. Morgan*, 486 U.S. 330 (1988), this Court rejected the argument that to foster FELA's humanitarian purposes, prejudgment interest be permitted even though it was not available at common law when FELA was enacted.

* * *

When adjudicating FELA cases, courts and juries are obligated to undertake their tasks in accordance with the system enacted by Congress. This includes requiring plaintiffs to prove their injury was proximately caused by the defendant's negligence. The Seventh Circuit's failed to do so, as have many other lower courts over recent decades. This Court should reverse the decision below and issue instructions to lower courts clarifying that FELA must be interpreted to require that plaintiffs prove proximate cause as an element of their claim.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

ROBERT MCBRIDE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are seamen injured in the service of their ships or the personal representatives of the estates of seamen killed in the service of their ships. They accordingly have claims under the Jones Act, 46 U.S.C. § 30104. Although this Court has recognized some situations in which Jones Act seamen have greater rights than railroad workers, injured seamen generally have the same rights under the Jones Act as injured railroad workers have under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60. The Court's construction of FELA in this case may therefore impact *amici*'s ability to recover for the injuries that they or their decedents suffered. *Amici* accordingly have an interest in ensuring that this Court understands the broader context in which this case will be decided.

Amicus Cheryl Campagno is the personal representative of the estate of her late husband, John Campagno. At the time of his death, John Campagno was employed as a seaman on the tug *Lucinda Smith* and the barge *Mudcat*, which were engaged in dredging

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[1] The parties have consented to the filing of this brief. Letters expressing their consent have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

the harbor in Norwalk, Connecticut. While off-duty and asleep in the crew quarters on the barge, he succumbed to carbon monoxide fumes and died. *Amicus* Campagno's Jones Act case is currently pending in the United States District Court for the District of Connecticut.

Amicus Daniel D. Hill was employed as a seaman on various tank barges. In 2008, while working as a member of the crew of tank barge *Energy 6503* in the territorial waters of Puerto Rico, and in 2009, while working as a member of the crew of tank barge *Energy 6505* in the Atlantic Ocean off the coast of Virginia, he suffered serious injuries requiring multiple surgeries as the result of his employer's negligence. His Jones Act case is currently pending in the United States District Court for the Eastern District of Louisiana.

Amicus Frances K. Jennings is the co-personal representative of the estate of her late son, Russell David Jennings. At the time of his death, Russell Jennings was employed as a seaman on the fishing vessel *Siberian Sea* in the Bering Sea. Immediately before his death, he was working alone in the vessel's freezer hold. A conveyer belt in the middle of the hold runs through a small bulkhead opening. Mr. Jennings's body was found face-down with his arms above his head, wedged on the conveyer belt between the chute's narrowing aluminum walls. Although no one witnessed the fatal injury, the physical evidence shows that he had become caught in the running conveyer belt, which had pulled him into the chute,

funneled him into the narrow passage as he struggled to escape, and crushed him to death. The estate's Jones Act case is currently pending in the Superior Court of Washington for King County.

Congress passed the Jones Act in 1920 to give injured seamen (or their estates) a negligence remedy against their employers – a remedy that this Court had previously denied in *The Osceola*, 189 U.S. 158, 175 (1903). Rather than detailing the requirements for this new cause of action, however, Congress instead declared that "in [the seaman's] action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." Merchant Marine Act, c. 250, § 33, 41 Stat. 1007 (1920), codified as amended at 46 U.S.C. § 30104. In its first case under the Jones Act, this Court "readily understood" that the reference was to FELA "and its amendments." *Panama Railroad v. Johnson*, 264 U.S. 375, 391-392 (1924). Congress had simply incorporated FELA by reference into the Jones Act.

This Court has frequently declared that "the Jones Act adopts 'the entire judicially developed doctrine of liability' under [FELA]." *American Dredging Co. v. Miller*, 510 U.S. 443, 456 (1994) (quoting *Kernan v. American Dredging Co.*, 355 U.S. 426, 439 (1958)). *See also, e.g., Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (when Congress "incorporate[ed] FELA unaltered into the Jones Act" the judicial "gloss" on FELA was intended to be part of the package). Thus the Court has adopted FELA interpretations

in Jones Act cases both when those interpretations have protected the rights of injured workers, *see, e.g.*, *Kernan*, 355 U.S. at 436 (applying "the principles developed in [a] line of FELA cases"), and when those interpretations have restricted those rights, *see, e.g.*, *Miles*, 498 U.S. at 32 (applying *Michigan Central Railroad Co. v. Vreeland*, 227 U.S. 59, 69-71 (1913)). Indeed, this Court has held that seamen under the Jones Act have the benefit of a relaxed standard of proximate cause precisely because "the standard of liability under the Jones Act is that established by Congress under [FELA]." *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 (1957).

To be sure, this Court has recognized situations in which Jones Act seamen properly have greater rights than railroad workers. In *Cortes v. Baltimore Insular Line*, 287 U.S. 367 (1932), for example, Justice Cardozo used very broad language when writing for the unanimous Court to explain a result under the Jones Act that would not have been possible under FELA:

> We do not read the [Jones Act] as expressing the will of Congress that only the same defaults imposing liability upon carriers by rail shall impose liability upon carriers by water. The conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties. . . . Congress did not mean that the standards of legal duty must be the same by land and sea.

287 U.S. at 377-378. Thus the estate of a seaman fatally injured as a result of his employer's failure to furnish "maintenance and cure," an obligation uniquely owed to seamen, could recover under the Jones Act even though no similar recovery would have been possible under FELA. In so ruling, the Court rejected the common-law rule (followed by the court below) that a "right of action for negligent care or cure was ended by [the victim's] death, and did not accrue to the [estate]." 287 U.S. at 370.

This Court again spoke expansively in *Cox v. Roth*, 348 U.S. 207 (1955), to suggest that the Jones Act does not always incorporate FELA concepts:

> The Jones Act, in providing that a seaman should have the same right of action as would a railroad employee, does not mean that the very words of the FELA must be lifted bodily from their context and applied mechanically to the specific facts of maritime events. Rather, it means that those contingencies against which Congress has provided to ensure recovery to railroad employees should also be met in the admiralty setting.

348 U.S. at 208. Thus the Court held that an action under the Jones Act survives the death of the tortfeasor, notwithstanding "the old common-law rule abating actions on the death of the tortfeasor," *id.* at 210, and notwithstanding the failure of FELA by its literal terms to provide for the survival of an action in that context. *See also The Arizona v. Anelich*, 298 U.S. 110 (1936) (unanimously holding that the common-law

assumption-of-the-risk doctrine does not defeat a Jones Act suit when a seaman's employer breached its seaworthiness obligation even though FELA at that time[2] provided for a narrower exception to the doctrine and FELA does not impose a seaworthiness obligation); *Beadle v. Spencer*, 298 U.S. 124 (1936) (following *The Arizona*).

In view of this Court's decisions in *Cortes*, *Cox*, *The Arizona*, and *Beadle*, the decision in this case will not necessarily impact *amici*. Even if this Court were to impose a more demanding proximate-cause standard under FELA in the present case, *amici* might still be able to claim the benefit of the well-established relaxed standard under the Jones Act. In view of this Court's frequent declarations of the connection between the two statutes, however, including *Ferguson*'s statements in the precise context of this case, a reversal here under FELA might complicate *amici*'s ability to recover under the Jones Act. Each *amicus* has a strong case for recovery under any causation standard, but common sense suggests that recovery will be less complicated under the familiar relaxed standard than under the new standard (whatever it might be) that petitioner advocates here.

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[2] As originally enacted, FELA eliminated the assumption-of-the-risk doctrine only in cases in which a railroad violated a safety statute. In 1939, Congress amended FELA to eliminate the doctrine entirely. *See* Federal Employers' Liability Act Amendments of 1939, c. 685, § 1, 53 Stat. 1404 (1939) (amending FELA § 4), codified at 45 U.S.C. § 54.

The possibility that the decision in the present case may impact *amici*'s rights gives them an interest in ensuring that this Court understands the broader context of the case. Restricting respondent's right to rely on the "relaxed standard of causation [that] applies under FELA," *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994), might also deprive injured seamen of the right to rely on the well-established causation standard under the Jones Act that this Court and the lower courts have applied for decades. Accepting the railroad's argument would not only make recovery more difficult for *amici* but would also upset the Congressional scheme for ensuring adequate compensation for seamen's workplace injuries.

STATEMENT

Respondent was injured in the course of his employment with petitioner. A jury concluded that his injury was caused in part by petitioner's negligence. The jury was instructed in language drawn from this Court's opinion in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 506 (1957), to apply the well-established "relaxed standard" of proximate cause[3]

[3] Courts and commentators have recognized for generations that "proximate cause" is a confusing and unfortunate term. *See, e.g., Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158, 180 (2007) (Ginsburg, J., concurring in the judgment); W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN,

(Continued on following page)

applicable in cases under FELA and the Jones Act. The district court declined to give petitioner's inconsistent instructions that would have required the jury to follow a more restrictive form of proximate cause – one of several variations that state courts have recognized over the decades.

On appeal, the Seventh Circuit held that it was not reversible error for the district court to decline to give petitioner's proposed instructions. That is the judgment now under review.

SUMMARY OF ARGUMENT

Petitioner invites this Court to make a revolutionary change in the law by abandoning the well-established "relaxed" or "featherweight" standard of proximate cause that this Court articulated in *Rogers* and that lower courts have applied without difficulty for decades. This Court rejected the strict common-law proximate-cause approach in *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1957). *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958), also demonstrates that causation under the Jones Act

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PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 264 (5th ed. 1984). Modern scholarship thus prefers the term "legal cause." *See, e.g., id.* This brief nevertheless adheres to the terminology used by the parties and many of the prior decisions, notwithstanding its shortcomings.

(and thus presumably under FELA) is not limited by narrow common-law doctrines.

The lower courts have consistently followed the relaxed proximate-cause standard under the Jones Act for over 50 years. The secondary commentary also recognizes that the relaxed standard is firmly established. Changing that well-established regime at this time would be disruptive for all concerned.

The relaxed proximate-cause standard is appropriate in view of the unique role that the Jones Act plays. Although a negligence statute, the Jones Act works in tandem with workers' compensation regimes and serves many of the same goals. Seamen lack the other remedies that are commonly available to land-based workers. But they are exposed to far greater dangers.

There is no need to impose a strict common-law proximate-cause standard under the Jones Act. That standard was intended largely to protect defendants from "infinite liability for all wrongful acts." But Congress and this Court have created other limits under the Jones Act that help to ensure that only a limited class of plaintiffs are protected by the Jones Act, and there are limits on the available damages.

ARGUMENT

Petitioner labors strenuously to persuade the Court that this case offers a clear choice between applying and not applying a proximate-cause requirement in FELA cases. That framing of the issue is a distraction. The status quo that petitioner attacks is not an absence of a proximate-cause requirement but a relaxed proximate-cause requirement recognized by this Court in *Rogers* and thereafter applied with the language of *Rogers* for over 50 years. Proximate cause is not so much about defining causation as it is about imposing policy limits on the extent to which a defendant is liable for the injuries that it causes. *See, e.g., Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158, 178 (2007) (Ginsburg, J., concurring in the judgment); W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 264 (5th ed. 1984). No one suggests that there are *no* policy limits on the extent of a defendant's liability. No one suggests that a FELA or Jones Act plaintiff should recover based on any of the truly remote causes suggested by petitioner (at 23) -- and petitioner has cited no case in which a jury instructed under the well-established "relaxed standard" articulated by this Court in *Rogers* has awarded damages to a plaintiff in such circumstances.

I. A Relaxed Standard of Proximate Cause Has Applied Under the Jones Act for Over Half a Century

Petitioner asks this Court to radically reformulate the law as it has been accepted and applied for over 50 years. Such a radical change would disrupt the settled expectations of employers and employees, flood the lower courts with cases seeking to reopen long-settled questions that might be answered differently in light of such a fundamental change, undermine Congress's goals in enacting FELA and the Jones Act, and defeat the assumptions on which Congress has legislated in this field during the ensuing decades.

A. This Court Rejected a Strict Common-Law Proximate-Cause Standard Comparable to that Advocated by Petitioner in Favor of a Relaxed Standard of Proximate Cause Under the Jones Act

This Court resolved the central issue in this case just over 54 years ago, and that resolution has worked effectively ever since. Petitioner argues that the *Rogers* Court did not recognize a relaxed standard of proximate cause in FELA cases and that subsequent statements to the contrary are merely dicta that should no longer be followed. *See* Pet. Br. 33-45. Even if petitioner's characterization of *Rogers*

were accurate,[4] the argument ignores this Court's contemporaneous decision in *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1957), a Jones Act case in which the appropriate standard of proximate cause was squarely before the Court – and there was no suggestion of multiple causes. In *Ferguson*, a seaman had lost two fingers on his right hand when he used "a sharp butcher knife" to serve ice cream that was too hard to serve with a normal scoop. *Id.* at 522. The district court entered judgment for the injured seaman on a jury verdict.

The Second Circuit reversed, concluding that the district court should have granted the employer's motion for a directed verdict. It reasoned: "The knife . . . was never designed for or intended to be used as a dagger or ice pick for chipping frozen ice cream. And that it would be put to such use was not within the realm of reasonable foreseeability." *Ferguson v. Moore-McCormack Lines, Inc.*, 228 F.2d 891, 892 (2d Cir. 1956). The use of the phrase "reasonable foreseeability" signals that the court of appeals relied on a stricter standard of proximate cause.[5]

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[4] In fact, petitioner's characterization of *Rogers* is inaccurate. *See* Resp. Br. 42-47.

[5] Courts and commentators have used a wide range of terms to discuss common-law proximate cause, just as they apply a wide range of differing approaches to common-law proximate cause. *See, e.g.*, Resp. Br. 5-9; *see generally* PROSSER AND KEETON, *supra*, §§ 41-45. Liability for unforeseeable consequences, however, is one of the core issues addressed by proximate cause. *See, e.g.*, *id.* § 43.

This Court rejected the Second Circuit's effort to impose a stricter standard of proximate cause. The four-justice plurality (in a 4-1-1-1-1[6] decision) explained the Court's holding as follows:

> Respondent urges that it was not reasonably foreseeable that petitioner would utilize the knife to loosen the ice cream. . . . It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident. . . . Since the standard of liability under the Jones Act is that established by Congress under [FELA], what we said in [*Rogers*] is relevant here:
>
> > "Under this statute the test of a jury case is simply whether the proofs justify with reason an inference that employer negligence played any part even the slightest in producing the injury or death for which damages are sought."

352 U.S. at 523. Even if the plurality's reliance on the *Rogers* standard is not, strictly speaking, binding authority, the Court's holding is nevertheless

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[6] Only Justice Harlan dissented on the causation standard. *See* 352 U.S. at 559. Justice Reed would have affirmed the judgment below, *id.* at 524, but he did not explain the basis for his vote. Justice Frankfurter dissented on the ground that the petition for certiorari should have been dismissed as improvidently granted. *Id.* Justice Burton concurred in the judgment, *id.*, and Justice Black did not participate, *id.*

directly on point. At the very least, the *Ferguson* Court rejected a strict common-law standard of proximate cause. Even if Justice Burton (the fifth member of the majority) favored some different proximate-cause standard, in order to reverse he necessarily applied a more relaxed standard than any of the various common-law versions that had been adopted in the general torts context – or any proximate-cause standard that would permit petitioner to succeed in the present case. A proximate-cause standard (whatever it might be) that permitted the *Ferguson* seaman to succeed on his more extreme facts, which is precisely what the majority held, is not only more relaxed than any standard that petitioner here could describe as a "common-law standard" but is also necessarily relaxed enough to permit respondent to succeed on the present facts (which in any event may well fall within the limits of even the instruction that petitioner requested).

In *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958), this Court again examined the causation standard in a Jones Act case. The *Kernan* seaman was killed in a fire that started when an open-flame kerosene lamp carried on the deck of scow, no more than three feet above the water, ignited the flammable vapors of petroleum on the water's surface. A Coast Guard regulation required the lamp to be carried at least eight feet above the water, but that regulation was designed to ensure visibility and thus

prevent collisions. It was not created to avoid fires. *See id.* at 427-428. The lower courts, the respondent, and the dissent all argued that the seaman's estate could not recover under the Jones Act because common-law "tort doctrine . . . imposes liability for violation of a statutory duty only where the injury is one which the statute was designed to prevent." *Id.* at 432; *see also, e.g., id.* at 442 (Harlan, J., dissenting). This Court once again "rejected [one] of the refined distinctions necessary in common-law tort doctrine for the purpose of allocating risks between persons who are more nearly on an equal footing as to financial capacity and ability to avoid the hazards involved." *Id.* at 438. It instead held that when

> the employer's conduct falls short of the high standard required of him by [the Jones Act], and his fault, in whole or in part, causes injury, liability ensues. And this result follows whether the fault is a violation of a statutory duty or the more general duty of acting with care. . . .

Id. at 438-439.[1] *Kernan* is thus solid authority at least for the proposition that causation under the Jones Act

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[1] In subsequent decisions, the *Kernan* Court's broad rejection of a proximate-cause requirement under the Jones Act has generally been limited to the breach-of-statutory-duty context in which *Kernan* arose, notwithstanding the Court's expansive dictum that the result would be the same "whether the fault is a violation of a statutory duty or the more general duty of acting with care," 355 U.S. at 439.

(and thus presumably under FELA) is not limited by narrow common-law doctrines. Petitioner's argument that the entire body of common-law proximate-cause doctrine (whatever that doctrine might be) must be incorporated wholesale into FELA and the Jones Act is flatly inconsistent with *Kernan*. In *Kernan*, this Court rejected a significant (and well-defined) aspect of that doctrine.[8]

B. The Lower Courts Have Consistently Recognized and Applied a Relaxed Standard of Proximate Cause Under the Jones Act

In view of this Court's clear holdings in *Ferguson* and *Kernan*, it is hardly surprising that the courts of appeals have consistently recognized the relaxed standard of proximate cause under the Jones Act, often describing it as a "featherweight" burden. *E.g.*, *Bielunas v. F/V Misty Dawn, Inc.*, 621 F.3d 72, 76 (1st Cir. 2010); *Alholm v. American Steamship Co.*, 144 F.3d 1172, 1178 (8th Cir. 1998); *Evans v. United Arab Shipping Co.*, 4 F.3d 207, 213 (3d Cir. 1993); *In re*

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[8] Indeed, it is noteworthy that the common-law doctrine that this Court rejected in *Kernan* has been widely accepted practically since it was first promulgated in *Gorris v. Scott*, L.R. 9 Ex. 125 (Exch. Ch. 1874). This is in sharp contrast with common-law efforts to agree on a standard of proximate cause. *See* Resp. Br. 5-9.

River Transportation Associates v. Wall, 5 F.3d 97, 100 n.4 (5th Cir. 1993) (John Minor Wisdom, J.).

1. The Fifth Circuit

This Court has recognized that the Fifth Circuit "has a substantial Jones Act caseload," and has accordingly shown particular respect for its expertise. *See, e.g., Chandris Inc. v. Latsis*, 515 U.S. 347, 365-368 (1995). Thus it is particularly relevant that the relaxed standard of proximate cause under the Jones Act is firmly entrenched in the court of appeals with the most practical experience in applying the statute (particularly in recent decades). In *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc), for example, seventeen judges unanimously agreed on the following summary of well-established legal principles:

> FELA provides, in pertinent part, that "[e]very common carrier by railroad . . . shall be liable in damages . . . for such injury or death *resulting in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier." [FELA § 1,] 45 U.S.C. § 51 (emphasis added). A seaman is entitled to recovery under the Jones Act, therefore, if his employer's negligence is the cause, in whole or in part, of his injury. In their earlier articulations of [FELA] liability, courts had replaced the phrase "in whole or in part" with the adjective "slightest." In [*Rogers*], the Supreme Court used the term "slightest" to describe the reduced standard

> of causation between the employer's negligence and the employee's injury in [FELA] cases. In [*Ferguson*, 352 U.S. at 523], the Court applied the same standard to a Jones Act case writing, "'Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" (quoting [*Rogers*]). * * * [T]he phrase "in whole or in part" as set forth in the statute, or, as it has come to be known, "slightest," modifies . . . the causation prong of the inquiry.

107 F.3d at 335 (first two omissions in original). Countless examples could be given of cases – both before and after *Gautreaux* – in which the court has recognized this relaxed standard. The Fifth Circuit routinely applies the relaxed standard of proximate cause when it rules in favor of seamen. *See, e.g., In re River Transportation Associates*, 5 F.3d at 100 n.4 (John Minor Wisdom, J.) ("[T]he [Jones Act] plaintiff's burden[] of proving causation is 'featherweight.'"); *Theriot v. J. Ray McDermott & Co.*, 742 F.2d 877, 881 (5th Cir. 1984) (applying "the principle that a Jones Act defendant must bear the responsibility for his negligence if such negligence played any part, *even the slightest*, in producing the injury"); *White v. Rimrock Tidelands, Inc.*, 414 F.2d 1336, 1338 (5th Cir. 1969) ("[T]he oft-repeated principle apparently still bears repeating that ' . . . [t]he employer may be held liable if his negligence "played any part,

even the slightest, in producing the injury or death for which damages are sought."'") (quoting *Hampton v. Magnolia Towing Co.*, 338 F.2d 303, 305 (5th Cir. 1964), which quoted *Rogers*); *see also Landry v. Oceanic Contractors, Inc.*, 731 F.2d 299, 302 (5th Cir. 1984) ("[T]he traditional 'proximate cause' test is not applicable to Jones Act claims; rather, in such a claim, a defendant must bear responsibility for his negligence if such negligence played any part, even the slightest, in producing the injury.").

Perhaps even more significantly, the Fifth Circuit also routinely applies the relaxed standard when it rules against seamen and holds that they did not satisfy even the relaxed standard. *See, e.g., Gavagan v. United States*, 955 F.2d 1016, 1019 (5th Cir. 1992) ("'[t]he question of proximate cause . . . under the Jones Act turns on whether the actions of the defendant contributed to the injury even in the slightest degree.'") (quoting *Sanford Bros. Boats, Inc. v. Vidrine*, 412 F.2d 958, 966 (5th Cir. 1969)) (alterations in original); *see also Johnson v. Cenac Towing, Inc.*, 544 F.3d 296, 302 (5th Cir. 2008) ("The standard of causation in Jones Act cases is not demanding.").

The Fifth Circuit's most recent decision to address the standard of proximate cause under the Jones Act strikingly demonstrates how firmly the *Rogers* standard is entrenched. At the trial in *Clark v. Kellogg Brown & Root*, No. 2:07-CV-191 (E.D. Tex. Oct. 22, 2009), even the defendant-employer accepted the familiar "featherweight" standard under which "a seaman's employer is liable if the employer's

negligence played any part, even the slightest, in causing the injury for which damages are sought." Defendant's Proposed Conclusion of Law 13, *Clark*. When the employer subsequently changed its mind and challenged the relaxed standard on appeal, the Fifth Circuit concluded that the law was so well-established – notwithstanding this Court's grant of certiorari in the present case – that it affirmed the district court in an unpublished opinion.[9] *See Clark v. Kellogg Brown & Root*, 2011 U.S. App. LEXIS 2354, 2011 WL 386787 (5th Cir. Feb. 4, 2011) (No. 09-41190) (unpublished).

It is not unusual for a Jones Act employer in the Fifth Circuit (such as the employer in *Clark*) to recognize the firmly entrenched application of the relaxed proximate-cause standard. Thus in *Danos v. United States*, 211 F.3d 125 (5th Cir. 2000) (unpublished), the plaintiff was employed as a member of the crew of the *SS Diamond State*, a public vessel of the United States. He sued the government as his employer for injuries that he allegedly suffered while serving as a seaman on the vessel. The principal issue on appeal was whether the seaman had satisfied the causation requirement to link the government's actions to his injury. Although it would have been in the government's interest to argue for a stricter version of the proximate-cause standard, the government forthrightly admitted that

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[9] In the Fifth Circuit, as in other circuits, the court may choose not to publish "opinions that merely decide particular cases on the basis of well-settled principles of law." 5th Cir. R. 47.5.1.

> Danos correctly cites the Jones Act standards, as defined by the courts, by which a plaintiff's traditional burden of proof of proximate cause is reduced. He may recover if defendant's negligence played even the slightest part in causing the injury.

Appellee United States' Br. 9, *Danos* (No. 98-31372), *available at* 1998 WL 34095836 (citing *Rogers*; *Ferguson*; *Gautreaux*). *See also, e.g.*, Brief of Appellee, United States of America 11, *Lopez v. United States*, 77 F.3d 477 (5th Cir. 1995) (No. 95-30216) (unpublished), *available at* 1995 WL 17116751 ("'Featherweight burden' or 'slight negligence' are terms oft-invoked by Jones Act plaintiffs, and rightly so."). Indeed, the United States routinely recognizes the application of the relaxed proximate-cause standard under the Jones Act – even when the government is the defendant as a Jones Act employer – not only in the Fifth Circuit but also in other courts of appeals. *See, e.g.*, Brief of Appellee and Cross-Appellant the United States of America 24, *Broderick v. United States*, 88 F. App'x 381 (11th Cir. 2003) (No. 03-10399), *available at* 2003 WL 23213489 ("Another 'qualification' of the Jones Act that distinguishes it from the common-law is the relaxed standard of causation manifested by the imposition of liability whenever 'employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'") (quoting *Rogers*); Brief of Appellee 16, *Callbreath v. United States*, 42 F. App'x 969 (9th Cir. 2002) (No. 00-35478), *available at* 2001 WL 34103547 ("the shipowner-employer may be

found liable if its negligence played even the slightest part in causing plaintiff's injuries").

2. Other Coastal Circuits

The law is substantially the same in every other maritime circuit. In *Napier v. F/V Deesie, Inc.*, 454 F.3d 61 (1st Cir. 2006), for example, the First Circuit reversed a summary judgment for the defendant that had been granted on the basis of insufficient evidence. The court explained:

> While Napier [the plaintiff] must establish all the elements of a common-law negligence claim, the burden to prove causation under the Jones Act is "featherweight." *Toucet* [*v. Maritime Overseas Corp.*], 991 F.2d [5,] 10 [(1st Cir. 1993)] (citations omitted). Napier need only demonstrate that the vessel's "negligence played any part, even the slightest, in producing the injuries for which the plaintiff seeks damages." *Connolly v. Farrell Lines, Inc.*, 268 F.2d 653, 655 (1st Cir. 1959) (citing [*Rogers*]).

454 F.3d at 67; *see also, e.g., Bielunas*, 621 F.3d at 76.

In *Wills v. Amerada Hess*, 379 F.3d 32 (2d Cir. 2004), Justice Sotomayor – then serving on the Second Circuit – recognized not only that "the [Jones Act] plaintiff bears a reduced burden of proof with respect to causation," *id.* at 47 n.8, but also that the

"well established" burden is to prove "'"that employer negligence played any part, *even the slightest*, in producing the injury."'" *id.* at 50 (quoting *Diebold v. Moore McCormack Bulk Transport Lines, Inc.*, 805 F.2d 55, 57-58 (2d Cir. 1986), which quoted *Rogers*).

In *Wilburn v. Maritrans GP Inc.*, 139 F.3d 350 (3d Cir. 1998), the Third Circuit reiterated the "relaxed" standard in Jones Act cases: "Causation is satisfied if 'the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury.'" *Id.* at 357 (quoting *Rogers*).

In *Martin v. Harris*, 560 F.3d 210, 216 (4th Cir. 2009), the Fourth Circuit recently summarized the governing law in substantially the same terms:

> Although the elements of duty, breach, and injury draw on common-law principles, the standard of causation in a Jones Act negligence action is relaxed. *See Hernandez* [*v. Trawler Miss Vertie Mae, Inc.*], 187 F.3d [432,] 436-37 [(4th Cir. 1999)]. Thus, an employer is liable if his "negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* at 436 (quoting [*Gottshall*, 512 U.S. at 543]) (internal quotation marks omitted).

In *Ribitski v. Canmar Reading & Bates, Ltd.*, 111 F.3d 658 (9th Cir. 1997), the Ninth Circuit discussed the requirements for a Jones Act case in some detail. The court explained, "[t]o recover on [a] Jones Act claim, [the plaintiff] must establish that his employer

. . . was negligent and that this negligence was a cause, however slight, of his injuries." *Id.* at 662. Elaborating on the causation requirement, the court continued:

> "[T]he test of a jury case [on the question of causation] is simply whether the proofs justify . . . that employer negligence played any part, even the slightest, in producing the injury . . . for which damages are sought." *Lies* [*v. Farrell Lines, Inc.*], 641 F.2d [765,] 771 [(9th Cir. 1981)] (quoting [*Rogers*]). This test, often described as a featherweight causation standard, allows a seaman to survive summary judgment by presenting even the slightest proof of causation.

111 F.3d at 664 (omissions in original). *See also, e.g.*, *MacDonald v. Kahikolu, Ltd.*, 581 F.3d 970, 975 n.7 (9th Cir. 2009) (recognizing "the relaxed causation standard under the Jones Act").

Because the Eleventh Circuit is bound by pre-1981 Fifth Circuit decisions, *see Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), the relaxed standard of proximate cause is well-established there, too. And the Eleventh Circuit has continued to recognize the familiar standard. In *Dempsey v. Mac Towing, Inc.*, 876 F.2d 1538, 1542 (11th Cir. 1989), for example, the court explained that a seaman may "recover on a Jones Act claim with a lower showing of proximate cause than would be required in a non-admiralty case." *See also, e.g.*, *McClow v. Warrior & Gulf Navigation Co.*, 842 F.2d

1250, 1251 (11th Cir. 1988) (per curiam) ("Jones Act claims . . . involve a less demanding standard of causation: 'causation may be found if the defendant's acts or omissions played any part, no matter how small, in bringing about the injury.'") (quoting *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 685 (10th Cir. 1981)).

3. Inland Circuits

Inland circuits have also consistently recognized the relaxed causation standard in Jones Act cases. In *Rannals v. Diamond Jo Casino*, 265 F.3d 442, 447-448 (6th Cir. 2001), for example, the Sixth Circuit – reversing a district court that had applied common-law principles to grant summary judgment to a Jones Act defendant – followed the Fifth Circuit's en banc decision in *Gautreaux* and explained that "once negligence is established, the plaintiff need only show that her employer's negligence 'played any part, even the slightest, in producing the injury or death for which damages are sought.'" (quoting *Rogers*). *See also, e.g., Szymanski v. Columbia Transportation Co.*, 154 F.3d 591, 596-597 (6th Cir. 1998) (en banc) (noting that "the Jones Act requires . . . a relaxed standard of causation" as opposed to "traditional proximate cause"); *Alholm v. American Steamship Co.*, 144 F.3d 1172, 1178 (8th Cir. 1998) ("In Jones Act cases the verdict must stand if 'the proofs justify with reason, the conclusion that employer negligence played any part, even the slightest, in producing the injury or death. . . .'") (quoting *Ferguson*, 352 U.S. at 523,

which quoted *Rogers*); *Cella v. United States*, 998 F.2d 418, 427 (7th Cir. 1993) ("Under the Jones Act, the plaintiff's burden to prove causation is 'very light' and has been described as 'featherweight.'"); *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 685 (10th Cir. 1981) ("It is settled that in Jones Act cases causation may be found if the defendant's acts or omissions played any part, no matter how small, in bringing about the injury.") (citing *Rogers*; *Ferguson*).

C. Commentators Have Consistently Recognized that a Relaxed Standard of Proximate Cause Applies Under the Jones Act

With the courts' substantially unanimous recognition of the relaxed proximate-cause standard under the Jones Act, it is no surprise that commentators have consistently recognized the long-established legal principles.

The leading treatise devoted specifically to the law governing seamen includes a full section on the "causation element" of a Jones Act case. *See* 2 ROBERT FORCE & MARTIN J. NORRIS, THE LAW OF SEAMEN § 30:41 (2003 & Supp. 2009). The discussion opens with the general statement that the Jones Act plaintiff must "prove not only that he suffered an injury but that the [defendant's] negligent act or omission was a cause of his injury or illness." *Id.* at 30-172. It continues with an explanation of how *Rogers* defined the "light burden of proof of causation" applicable

under the Jones Act, *id.* at 30-173, concluding that "[t]he burden to prove causation in a Jones Act case is 'very light' or 'featherweight,'" *id.* (quoting *Bommarito v. Penrod Drilling Corp.*, 929 F.2d 186, 188 (5th Cir. 1991)). To illustrate how the causation requirement works in practice, the authors quote the Fifth Circuit's approved jury instruction, which is directly based on *Rogers*. *See id.* at 30-173 to -174. And they carefully note the "important distinction between the legal standard as to the level of causation required" under the Jones Act and the level "required for other torts and the general maritime law." *Id.* at 30-174.

The most detailed treatise on maritime law also includes a full section on "proximate cause" in Jones Act cases. *See* 1B BENEDICT ON ADMIRALTY § 28 (7th rev. ed. 2010). That discussion opens with the observation that "[t]he issue of proximate cause assumes special significance in seamen's personal injury litigation because different standards of causation are applied" under the Jones Act and other causes of action. *Id.* at 3-159 (footnote omitted). With that distinction in mind, the authors summarize the law in familiar terms:

> The burden on the plaintiff of proving causal negligence under the Jones Act . . . is considerably lighter; the Act does not exclude liability for remote damages; the shipowner will be held liable if his "negligence played any part, even the slightest, in producing the

> injury or death for which damages are sought."

Id. at 3-163 (quoting *Rogers*). They further explain that "[a]lthough Rogers spoke only of a 'jury case,' its language has been adopted to define proximate cause under the Jones Act." *Id.* at 3-172 (footnotes omitted).

The relaxed standard of proximate cause under the Jones Act is such a fundamental principle in maritime law, that it is noted even in the most basic and general treatises. *See, e.g.*, FRANK L. MARAIST, THOMAS C. GALLIGAN, JR. & CATHERINE M. MARAIST, ADMIRALTY IN A NUTSHELL 254 (6th ed. 2010) (summarizing the Jones Act causation rule as "employer is responsible for injuries caused 'in whole or in part' by its negligence" and adding that "the Jones Act plaintiff's burden of proof on causation is 'featherweight'"); GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 6-36, at 377 (2d ed. 1975) (noting that on "the proximate cause issue" a Jones Act plaintiff's "burden is . . . reduced to featherweight"); THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 4-22, at 276-277 (4th ed. 2004) ("The standard of causation in a Jones Act case is quite clear. The plaintiff may recover if, under the facts, the negligence of the defendant played any part, even the slightest, in producing the injury or death for which damages are sought. Thus, the burden on the plaintiff to prove causation is 'very slight.'") (footnotes omitted).

II. A Relaxed Standard of Proximate Cause Under the Jones Act Is Appropriate in View of the Unique Role That the Jones Act Plays in Compensating Seamen Who Have Been Injured in the Service of Their Ships

In *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958), this Court explained in detail the role that the Jones Act plays in ensuring adequate compensation for injured seamen. The nineteenth century common-law doctrines, one of which petitioner seeks to resurrect here, were "designed to give maximum freedom to infant industrial enterprises, 'to insulate the employer as much as possible from bearing the "human overhead" which is an inevitable part of the cost – to someone – of the doing of industrialized business.'" 355 U.S. at 431 (quoting *Tiller v. Atlantic Coast Line Railroad Co.*, 318 U.S. 54, 59 (1943)). But roughly a century ago, Congress and the state legislatures "recognized that, whatever the rights and duties among persons generally, the industrial employer had a special responsibility toward his workers, who were daily exposed to the risks of the business and who were largely helpless to provide adequately for their own safety." *Id.* For most employees injured on the job, workers' compensation statutes have created a no-fault system to ensure that medical bills are paid and sufficient resources on which to live are available when accidents occur. *See, e.g.*, Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 8101-93 (workers' compensation statute for federal employees). "In the railroad and shipping industries, however, the FELA and Jones Act provide the framework for determining liability for industrial accidents." 355 U.S. at 432. Any comparison between

FELA or the Jones Act and "*other* statutes that authorize private parties to recover for injuries resulting from tortious conduct – the antitrust, RICO, and securities statutes," Pet. Br. 47; *cf.* AAR Br. 25-26, is therefore misplaced. Those statutes address "the rights and duties among persons generally." 355 U.S. at 431. FELA and the Jones Act are more closely analogous to no-fault workers' compensation statutes, which require neither negligence nor causation – let alone proximate causation – for recovery. Recognizing that employers should now bear the "human overhead," the *Kernan* Court concluded that "it is clear that the general congressional intent was to provide liberal recovery for injured workers." *Id.* at 432.

A. It is Essential for Seamen to Retain the Robust Remedy Under the Jones Act That Has Existed for Decades

The need for a robust remedy is particularly strong in the Jones Act context for injured seamen and their families do not – and cannot – have the remedies that are generally available to other workers.[10] While the majority of U.S. workers are protected

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[10] Seamen admittedly benefit from two personal injury remedies under the general maritime law that are unavailable to most workers, but without the Jones Act they are inadequate to give seamen the protection they need and have long enjoyed. Under the ancient doctrine of "maintenance and cure," injured seamen are entitled to modest living expenses ("maintenance") and medical expenses ("cure"). *See, e.g.*, *The Osceola*, 189 U.S. 158, 175 (1903). At best, the seaman's "cure" right simply matches the comparable right to have medical expenses paid under a workers' compensation statute. But the right is more limited. The obligation

(Continued on following page)

by state workers' compensation statutes, this Court has established as a matter of constitutional law that no state workers' compensation statute can apply to a

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extends only "until such time as the [seaman's] incapacity is [medically] declared to be permanent." *Vella v. Ford Motor Co.*, 421 U.S. 1, 5 (1975). This means, for example, that a seaman who "is totally and permanently blind and suffers post-traumatic convulsions which probably will become more frequent and are without possibility of further cure" is not entitled to further payments, even though "he will require some medical care to ease attacks of headaches and epileptic convulsions." *Farrell v. United States*, 336 U.S. 511, 513 (1949).

"Maintenance" is intended to provide money for food and lodging comparable to what the seaman would have had on the ship, but in the 1940s and '50s courts "fell into the habit" of awarding only $8.00 a day. *Incandela v. American Dredging Co.*, 659 F.2d 11, 14 (2d Cir. 1981). Even today, that is often all a seaman receives. *See, e.g., Skouronek v. American Steamship Co.*, 505 F.3d 482 (6th Cir. 2007); *Ammar v. United States*, 342 F.3d 133 (2d Cir. 2003). And even this limited right terminates when "the [seaman's] incapacity is [medically] declared to be permanent." *Vella*, 421 U.S. at 5.

In certain circumstances, a seaman may also be entitled to recover under the general maritime law "for injuries received . . . in consequence of the unseaworthiness of the ship." *The Osceola*, 189 U.S. at 175. The available damages are the same as a seaman with a valid Jones Act claim could recover (and of course no double recovery is possible). The remedy is available on a no-fault basis, in recognition of the compelling need to ensure compensation for seamen who are injured in the course of their employment. *See, e.g., Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 103-104 (1944). But it is no substitute for a robust remedy under the Jones Act because it is available only in limited circumstances. *See, e.g., Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 500 (1971) (denying recovery for unseaworthiness because the injury was caused not by an unseaworthy condition but instead by the negligence of a fellow employee).

maritime worker injured at sea. *See Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). Even Congress has been held to lack the power to authorize the extension of a state workers' compensation statute to a maritime worker injured at sea. *See Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920). And when Congress enacted the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950 – the federal workers' compensation statute that covers most maritime workers – it quite deliberately excluded seamen from that coverage. *See* LHWCA § 2(3)(G), 33 U.S.C. § 902(3)(G).[11] If this Court were to increase the burden on seamen to prove causation, it would be removing a fundamental protection when no adequate alternative is available.

This Court has frequently recognized that "the Jones Act and the LHWCA are complementary regimes that work in tandem." *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 488 (2005). LHWCA provides coverage for land-based maritime workers who do not qualify as seamen while the Jones Act limits its coverage exclusively to seamen. Indeed, the two statutes are so closely linked that this Court has noted the irony that the Jones Act's central term – "seaman" – is defined not in the Jones Act but in

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[11] Congress similarly excluded seamen from workers' compensation benefits in other maritime statutes. *See, e.g.*, Outer Continental Shelf Lands Act § 4(b)(1), 43 U.S.C. § 1333(b)(1).

LHWCA § 2(3)(G), 33 U.S.C. § 902(3)(G). *See Chandris Inc. v. Latsis*, 515 U.S. 347, 356 (1995); *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 347 (1991). The two statutes are undoubtedly distinct, and each has its own set of requirements that must be satisfied to permit recovery. The Jones Act, for example, requires proof of negligence whereas LHWCA does not. But the two statutes share the same fundamental purpose of ensuring adequate compensation for injured maritime workers.

The special need to protect seamen has been well-recognized for centuries. Justice Story declared that "[t]hey are emphatically the wards of the admiralty." *Harden v. Gordon*, 11 Fed. Cas. 480, 485 (C.C.D. Me. 1823) (No. 6,047). This Court has continued to recognize that status. *See, e.g., Atlantic Sounding Co. v. Townsend*, 129 S.Ct. 2561, 2570 (2009) (quoting *The Arizona*, 298 U.S. at 123); *Chandris Inc. v. Latsis*, 515 U.S. at 354-355. To be sure, this Court has also observed that the admiralty courts' "special solicitude for the welfare of seamen and their families" is "insufficient" to create new remedies, without Congressional authority, that seamen have not traditionally possessed. *Miles*, 498 U.S. at 36. But that is a far cry from the present situation in which petitioner seeks a radical reinterpretation of the law that would call into question rights created by Congress that seamen have enjoyed without significant controversy for decades. If the special rights of seamen have any

meaning at all, it must surely protect them from being deprived of such well-established rights.

Although the working conditions for many seamen have improved considerably since Justice Story's time, seamen continue to work long hours under dangerous conditions without the safeguards that are commonly available to other workers. For example, Russell Jennings, *amicus* Jennings's decedent, was a crew member on a fishing vessel in the Bering Sea – recently recognized by the Bureau of Labor Statistics as the nation's most deadly occupation.[12] Like virtually all U.S. fishermen (and most seamen), he had no union to protect his interests. This Court has often recognized that the dangers of railroad employment justify a liberal interpretation of FELA. *See, e.g., Gottshall*, 512 U.S. at 542. That concern applies even

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[12] The most recent data from the Bureau of Labor Statistics identifies "fishers and related fishing workers" as the occupation during the previous year with the highest fatal injury rate (200 deaths per 100,000 full-time equivalent workers). *See Selected occupations with high fatal injury rates, 2009*, in Bureau of Labor Statistics, U.S. Dept. of Labor, National Census of Fatal Occupational Injuries in 2009 (Preliminary Results), at 19 (August 19, 2010), *available at* http://www.bls.gov/iif/oshwc/cfoi/cfch0008.pdf. Indeed, the fatal injury rate for "fishers and related fishing workers" was well over three times as high as it was for the second most deadly occupation ("logging workers," with a rate of 61.8 deaths per 100,000 full-time equivalent workers) and over 60 times as high as the fatal injury rate for all workers (3.3 deaths per 100,000). *See id.*

more strongly in the even more dangerous Jones Act context.

B. There is No Need Under the Jones Act for a More Onerous Proximate-Cause Standard

The principal rationale at common law for a strict proximate-cause standard was the need to protect defendants from "infinite liability for all wrongful acts." PROSSER AND KEETON, *supra*, § 41, at 264. But Congress and this Court have already created substantial safeguards to ensure that "infinite liability" is not a risk under the Jones Act.

Most fundamentally, only "[a] seaman injured in the course of employment" (or the seaman's personal representative, in the case of fatal injuries) can bring an action under the Jones Act "against the employer." 46 U.S.C. § 30104. In other words, a defendant's liability under the Jones Act is limited to injured workers who qualify as "seamen." In a line of over a dozen cases, this Court has established strict requirements limiting the class of workers that is entitled to seaman status. *See, e.g., Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005); *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997); *Chandris Inc. v. Latsis*, 515 U.S. 347 (1995); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991); *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991). A defendant will not be liable under the Jones Act for injuries to its other employees, even if they are

injured on board a ship at sea. Thus the employee in *Chandris v. Latsis* was ultimately unsuccessful in his Jones Act suit when the jury found (on remand from this Court) that he did not qualify as a seaman. *See* Docket, *Latsis v. Chandris, Inc.*, 1998 WL 458095 (S.D.N.Y. Aug. 4, 1998) (No. 91 Civ. 6900(LAP)) (entry for May 5, 1999).[13]

In 1982, Congress amended the law to ensure that certain foreign workers could not sue "for damages for personal injury or death" under the Jones Act (or under any U.S. maritime law), 46 U.S.C. § 30105, thus further protecting employers from "infinite liability for all wrongful acts." Decades before, this Court had developed choice-of-law rules in the Jones Act context that effectively limit the ability of foreign seamen to claim the protection of the Jones Act. *See Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 381-384 (1959).

And even when a seaman is able to recover under the Jones Act, this Court has restricted the recoverable damages, thus further protecting defendants from "infinite liability for all wrongful acts." In *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), for example, this Court explained that "[t]here is no recovery for

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[13] Similarly, a defendant is not liable under the Jones Act to seamen injured by its negligence if they work for another employer. *See, e.g., Romero v. International Terminal Operating Co.*, 358 U.S. 354, 384-385 (1959).

loss of society in a Jones Act wrongful death action," *id.* at 32, and that the Jones Act "survival provision limits recovery to losses suffered during the decedent's lifetime," *id.* at 36, thus precluding recovery for a decedent's lost future earnings.

In sum, a combination of doctrines serve to protect Jones Act defendants from "infinite liability for all wrongful acts" far more effectively than the strict common-law proximate-cause doctrine that petitioner seeks to resurrect here. The only purpose that would be served by imposing that long-rejected requirement in the present context would be "to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost – to someone – of the doing of industrialized business." *Tiller*, 318 U.S. at 59. But that is a result that Congress has long since rejected.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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